CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 25, 1905.
CERTIORARI AND RETURN FILED APRIL 18, 1905.

(19,683.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1905.

a Transcript of Record.

United States Circuit Court of Appeals, Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
versus.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupt, *et al.*, Respondents. } No. 532.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg.

Petition Filed January 22nd, 1904.

Clerk's office, U. S. circuit court of appeals, fourth circuit. Henry T. Meloney, clerk, Richmond.

1 In the United States Circuit Court of Appeals, Fourth Circuit.

Petition for Review.

Filed January 22, 1904.

By FIRST NAT'L BANK OF BALTIMORE
vs.
STAAKE, Trustee, *et als.*

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.

In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

Your petitioner, The First National Bank of Baltimore, Maryland, respectfully submits that it is aggrieved by that part of an order which was entered in the above styled proceedings on January 14th, 1904, by the district court of the United States for the western district of Virginia, sitting as a court of bankruptcy, whereby it was adjudged, ordered and decreed:

(1.) "That for reasons stated in a written opinion the demurrer of the attaching creditors to the petition of William H. Staake, trustee, be, and the same is hereby overruled.

(2.) * * * "That the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by the attaching creditors, to-wit: * * * The First National Bank of

Baltimore, Maryland, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, William H. Staake, trustee of the said estate, be, and he is hereby, subrogated to said rights, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings intervened."

2 Your petitioner respectfully shows that the facts in this case were agreed between all the parties in interest by a writing dated the 25th day of February A. D., 1903, filed with the record. A summary of such of the facts as it is deemed necessary to submit to the court at this time and a statement of how the questions at issue were raised, are as follows:

On December 7th, 1899, Chester R. Baird, trading as C. R. Baird & Co., was the owner of certain real estate lying partly in the city of Roanoke and partly in the county of Roanoke, Virginia, which is known and designated as the West End Furnace property. That as of said date, he sold said property to the Roanoke Furnace Company, a corporation, and received from said furnace company all of the consideration to which he was entitled under said contract. This contract, however, was not recorded and no deed was at that time executed, though the Roanoke Furnace Company immediately took possession of the property.

On October 26th, 1900, the said Baird was indebted to the First National Bank of Baltimore in the sum of twelve thousand ($12,000) dollars and interest; and as of said date it caused an attachment to be levied and thereby acquired a lien upon the West End Furnace property under and pursuant to the laws of the State of Virginia.

On November 5th, 1900, the said Baird under and pursuant to the contract above referred to, conveyed said property to the Roanoke Furnace Company, the said deed of conveyance being recorded on November 7th, 1900, and November 8th, 1900, in the proper offices of Roanoke city and county.

On November 24th, 1900, an involuntary petition in bankruptcy was filed against said Baird, in the district court of the United States for the eastern district of Pennsylvania, by certain other of his creditors. On December 29th, 1900, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company in said court.

On the 2nd day of January, 1901, the district court of the United States for the western district of Virginia, assumed ancillary jurisdiction of so much of said proceedings as pertained to or related to the property located in the State of Virginia.

On the 29th day of March, 1901, William H. Staake, was appointed trustee of the estate of C. R. Baird, bankrupt, and on the 27th day of June, 1901, John N. M. Shimer was appointed trustee of the estate of the Roanoke Furnace Company, bankrupt.

3 That the attachment which was levied by petitioner is a valid lien under the laws of the State of Virginia, on the

West End Furnace property, and is a present valid lien thereon prior to the rights of the Roanoke Furnace Company.

That the property known as the West End Furnace property by virtue of decrees entered in the above mentioned bankruptcy proceedings was exposed to sale and sold, but without prejudice to petitioner's lien, and that out of said proceeds of sale sufficient was retained, and is now held subject to the order of the court, to pay the full amount of petitioner's debt, principal, interest and costs. That subsequently a petition was filed in the district court of the United States for the western district of Virginia, in bankruptcy, by William H. Staake, Tr., wherein it was asked, *inter alia*, that the lien acquired by your petitioner upon the West End furnace property be declared void as to him, and be preserved by the court for his benefit as the trustee of C. R. Baird. To this petition, a demurrer and answer was filed, upon the hearing of which the portion of the order as hereinbefore complained of was entered.

Your petitioner prays the jurisdiction of this court under the provisions of the act of Congress approved July 1st, 1898, and as amended and re-enacted by an act approved February 5th, 1903, entitled, "An act to establish a uniform system of bankruptcy throughout the United States," whereby it was given jurisdiction—sec. 24*b*—to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within its jurisdiction.

Your petitioner respectfully represents that said district court erred in matters of law when it entered the portion of the decree, as hereinbefore set forth, and when said court decided and held:

1st. That an attachment which was and is a valid lien under the the laws of the State of Virginia upon certain real estate which could not pass to the bankrupt debtor's trustee as a part of the estate of the bankrupt, the title to said real estate, both legal and equitable, having been transferred to a third party by a valid conveyance prior to the filing of a petition in bankruptcy against the debtor, is void under section 67*f quoad* the bankrupt debtor's trustee.

2nd. That the trustee of a bankrupt, under and by virtue of section 67*f*, should be subrogated to the rights of an attaching creditor in an attachment which is a lien upon the property of a third party, property to which the bankrupt had no title, either legal or
4 equitable, property which the bankrupt could not have transferred and which could not have been levied upon and sold under judicial process against him prior to the filing of a petition in bankruptcy. That under said section, in the case at bar, assets are made available to the bankrupt's trustee other than such as he could acquire and hold under sec. 70*a*.

3rd. That under and by virtue of section 67*f*, a trustee of a bankrupt should be subrogated to the rights of the attaching creditor in an attachment which is a lien upon property which could not pass to the trustee as a part of the estate of the bankrupt, and should enforce such lien for the benefit of all the creditors, when without such subrogation the lien would not be annulled or the property affected

discharged therefrom under section 67*f*. In other words, that the trustee should be subrogated to the rights of the creditor in an attachment, the lien of which is valid.

4th. That a preference is created which will not be permitted by the bankrupt act, if one creditor receive the full payment of his debt, even though such payment be made out of an asset which did not belong to the bankrupt debtor and which cannot be subjected by his trustee for the benefit of all the creditors.

5th. That the court erred in overruling the demurrer of the attaching creditors to the petition of William H. Staake, trustee as aforesaid.

The agreed facts which were filed with the petition as a part thereof show that at the time of the suing out of said attachments the property levied on, so far as the creditors represented by William H. Staake, trustee, were concerned was not the property of C. R. Baird, but the property of the Roanoke Furnace Company. Said attachment became a lien on said property by virtue of the registry laws of the State of Virginia and not by virtue of the fact that said property was that of C. R. Baird, and the said petition did not disclose that the creditors represented by William H. Staake at the date of the filing of the petition in bankruptcy had any claim to or interest in said West End Furnace property. All that said creditors were entitled to was to have the property owned by the said Baird or such as is covered by section 70*a* of the bankrupt act, subjected to the payment of their debts, and it was error in the court to hold under the facts of the case at bar that the provisions of the bankrupt law applied.

6th. That said court erred in holding, as is provided in the second clause of the decree hereinbefore set forth, that the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by this petitioner, should be preserved for the benefit of said William H. Staake, trustee, or direct that he be subrogated to the rights of the petitioner under said attachment.

It is, therefore, submitted that the court erred in all of its findings hereinbefore mentioned, for the reasons hereinbefore stated and such other reasons as will be hereafter advanced upon the argument of this petition.

In tender consideration whereof, your petitioner prays this honorable court to superintend and revise in matter of law the said proceedings and findings of said district court; that it revise, reverse and annul that portion of the order of January 14th, 1904, as hereinabove set forth by which your petitioner is aggrieved, and that it enter or cause to be entered such order or orders as will secure to petitioner the rights which it is clearly entitled to under the law.

And your petitioner will, in duty bound, ever pray, &c.

FIRST NATIONAL BANK OF BALTIMORE,
By J. D. FERGUSON, Its President.

S. HAMILTON GRAVES,
For Petitioner.

Memorandum.

A certified copy of the above petition, with notice to respondent's attorney to answer, demur or move to dismiss said petition within fifteen days, was mailed to S. Griffin, Esq., January 22, 1904, as required by rule 36 bankruptcy.

HENRY T. MELONEY, Cl'k.

6 Transcript of Record.

Filed Feb. 3, 1904.

UNITED STATES OF AMERICA, }
Western District of Virginia. }

Pleas in the district court of the United States for the western district of Virginia, before the Honorable Henry C. McDowell, judge of the district court of the United States for the western district of Virginia, on Thursday, the 14th day of January, anno Domini, and in the 128th year of the Independence of the United States.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt.

In re ROANOKE FURNACE COMPANY, Bankrupt.

In Bankruptcy.

WM. H. STAAKE, Trustee,
versus
FIRST NATIONAL BANK OF BALTIMORE, MD., and Others. } On Petition.

Be it remembered, that heretofore, to-wit: on the 27th day of February, 1903, in the clerk's office of the said district court of the United States for the western district of Virginia, came the said William H. Staake, trustee, by counsel, and filed his petition in the matters of C. R. Baird, trading as C. R. Baird & Co., and the Roanoke Furnace Company, bankrupts, which petition is in the words and figures following, to-wit:

Petition of William H. Staake, Trustee.

Filed Feb'y 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Company, Bankrupt. In Bankruptcy.

In the Matter of ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

To the Honorable Henry Clay McDowell, judge of the said court:

The petition of William H. Staake, trustee of the estate of
7 Chester R. Baird, trading as C. R. Baird & Company, bankrupt, respectfully represents:

1. That your petitioner is the trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, having been appointed and qualified as such in proceedings pending in the district court of the United States for the eastern district of Pennsylvania, whereof this honorable court has assumed ancillary jurisdiction.

2. That your petitioner has filed against the estate of Roanoke Furnace Company, in proceedings likewise pending in the district court of the United States for the eastern district of Pennsylvania, whereof this honorable court has likewise assumed ancillary jurisdiction, his claim in the sum of $158,757.55. This amount includes $85,000 due by Chester R. Baird to Robert E. Tod in part payment for the Roanoke or West End Furnace property; the Roanoke Furnace Company assumed payment of this as part of the consideration of the conveyance to it by Chester R. Baird of the said premises, but failed to carry out its agreement, and Baird was obliged to pay the same to Tod.

3. That the said premises were attached by sundry creditors of said Baird, as and for his property, by reason of the non-recordation of the deed from said Baird to the Roanoke Furnace Company. The facts respecting the conveyance of the said premises, the said attachments, the insolvency of Baird and of Roanoke Furnace Company, and the like, are set forth at length in the agreed statements of fact hereto attached, marked Exhibit A, and made part hereof.

4. That your petitioner, by decree of the district court of the United States for the eastern district of Pennsylvania, was ordered to have himself subrogated to the rights of the aforesaid attaching creditors, said decree being as follows:

"And now, to-wit, this 3rd day of May, A. D. 1901, upon consideration of the foregoing petition and on motion of John Dickey, Jr., Hazard Dickson and Samuel W. Cooper, Esqs., attorneys for William H. Staake, trustee of the estate of Chester R. Baird, trading as

C. R. Baird & Company, it is ordered, adjudged and decreed that William H. Staake, trustee as aforesaid, be and he hereby is authorized and directed to proceed in an appropriated manner to have himself subrogated to the rights of the holders of the liens of attaching creditors of Chester R. Baird, trading as C. R. Baird & Company, who have levied by foreign attachment and otherwise
8 upon the premises contracted to be conveyed to the said Baird by Robert E. Tod, and empowered, when thus subrogated, to enforce the same in his name as trustee with like force and effect as the holders of the said liens might have done had not bankruptcy proceedings intervened; but the said liens shall in that event be subordinated to the receiver's certificates authorized by the order of this court on the 30th day of March, 1901, as amended by the further order made on the 19th day of April, 1901, *In re* Roanoke Furnace Company, bankrupt."

The receiver's certificates mentioned in said decree have now all been discharged.

Your petitioner therefore shows that under the laws of Virginia, the rights of the aforesaid attaching creditors are superior to those of Roanoke Furnace Company, bankrupt, and that *quoad* them the property attached is the property of Chester R. Baird, now bankrupt; but that by reason of the insolvency of Chester R. Baird at the time of the levying of the said attachments, these attachments (having been levied within four months of the filing of the petition praying that he be adjudged a bankrupt) are to be deemed null and void under the provisions of the bankruptcy act of 1898, unless the court shall order that they be preserved for the benefit of his estate.

Your petitioner further shows that it would be to the benefit of the estate whereof he is trustee thus to preserve the said attachments as already directed by the district court of the United States for the eastern district of Pennsylvania, the court of primary jurisdiction.

Your petitioner therefore prays that your honorable court will assume jurisdiction of the matter, and that the attachments aforesaid be decreed null and void as regards the present plaintiffs, but that they be preserved for the benefit of your petitioner.

Your petitioner further prays that if this honorable court declines to assume jurisdiction and remits the matter to the courts out of which the said attachments issued, this honorable court will nevertheless order these attachments preserved for the benefit of the estate whereof your petitioner is trustee, and direct your petitioner to proceed to have himself subrogated to the rights of the holders of the said attachments, and empower him to perfect and enforce the same in his name as trustee.

And your petitioner will ever pray.

WILLIAM H. STAAKE,
Trustee for, &c.

HAZARD DICKSON.
SAM'L GRIFFIN, P. Q.
Affidavits waived.

9 Agreed Statement of Facts, &c.

EXHIBIT A WITH PETITION OF STAAKE, TRUSTEE.

In the Matter of C. R. BAIRD & Co. and THE ROANOKE FURNACE COMPANY, Bankrupts, and THE FIRST NATIONAL BANK OF BALTIMORE, MARYLAND.

In order to avoid the expense and delay of taking testimony and to have it judicially ascertained which court, State or Federal, has jurisdiction, it is mutually agreed between William H. Staake, trustee of the estate of C. R. Baird, trading as C. R. Baird & Company; John N. M. Shimer, trustee of the estate of the Roanoke Furnace Company and the First National Bank of Baltimore, Maryland, as follows:

1. That as of October 22nd, 1900, Chester R. Baird, was indebted to the First National Bank of Baltimore, Maryland, in the sum of twelve thousand dollars, ($12,000), with interest thereon at six per cent., from said date, and a protest fee of $2.31; that on October 26, 1900, said bank filed in the clerk's office of the hustings court for the city of Roanoke, Virginia, on the chancery side thereof, a bill of complaint, wherein it was plaintiff, and Chester R. Baird, The Roanoke Furnace Company *et als.* were defendants; that upon said bill and affidavits then filed it caused an attachment to be issued against C. R. Baird and the same was on the 26th day of October, 1900, levied on the property of said C. R. Baird, in the city of Roanoke, Va., and upon the real estate and fixtures thereto belonging, known as the West End Furnace property; that said attachment was also, on said date, served on Charles E. Hatch, treasurer of the Roanoke Furnace Company, and on one Frank F. Amsden, said Hatch and Amsden being in possession of the attached property; that said bank on said date filed in the clerk's office of said court a *lis pendens* as provided by the statutes of Virginia, and the same was then recorded in Deed Book No. 125, page 89, that said bank also caused a copy of said attachment to be directed to the sheriff of Roanoke county, Virginia, which said attachment was by said sheriff levied on October 30th, 1900, on certain real estate in said county, a portion of which was known as the West End Furnace property, and served upon George Ray and J. G. Manning, who had said property in possession; that a *lis pendens*, as provided by the statutes of Virginia, was on said date filed in said clerk's office of said county, and recorded in Deed Book —, page —; that on January 10th, 1901, the said First National Bank of Baltimore was

10 upon the prayer of T. L. Woodruff and others enjoined and restrained by the district court of the United States for the western district of Virginia, from prosecuting its said attachment proceedings above mentioned; and that said injunction was not dissolved until the — day of December, 1902.

2. That a petition praying that Chester R. Baird, trading as C. R. Baird & Company, be adjudged an involuntary bankrupt was filed in the district court of the United States for the eastern district of Pennsylvania, on the 24th day of December, A. D. 1900, and a further petition was filed in said court on the 26th day of December, 1900, in accordance with the prayer of which John N. M. Shimer and William H. Staake were appointed receivers of the estate of the said Chester R. Baird, trading as C. R. Baird & Co., and such receivers duly qualified and entered upon the duties of their office.

That the said bank filed no attachment bond and neither the sergeant nor the sheriff took possession of the attached property.

3. That a petition was filed in the district court of the United States for the western district of Virginia, on the 2nd day of January, 1901, praying among other things that said court assume ancillary jurisdiction of the cause and appoint receivers of the estate of the said alleged bankrupt, found within the territorial jurisdiction of said court, and in pursuance thereof the said John N. M. Shimer and William H. Staake were appointed receivers of said estate, who thereupon qualified and entered upon the duties of their office, and assumed possession of said estate.

4. That Chester R. Baird, trading as C. R. Baird & Co., was on February 18th, 1901, by the district court of the United States for the eastern district of Pennsylvania duly adjudged a bankrupt and on the 29th day of March, 1901, William H. Staake was appointed trustee of the estate, who thereupon qualified and entered upon the discharge of his duties and took possession of the estate of the bankrupt, as set out in the inventory and appraisement filed in the record in said cause.

5. That a petition praying that the Roanoke Furnace Company be adjudged an involuntary bankrupt was filed in the district court of the United States for the eastern district of Pennsylvania, on December 29th, 1900, and the said court in said proceedings, in accordance with the prayer of the *the* petition filed therein, appointed William H. Staake and John N. M. Shimer receivers of the estate of the said Roanoke Furnace Company, who duly qualified as such and entered upon the duties of their office.

11 6. That a petition was filed in the district court of the United States for the western district of Virginia, on the 2nd day of January, 1901, praying, among other things, that the court assume ancillary jurisdiction of the matter of the Roanoke Furnace Company, alleged bankrupt, and appoint receivers of the estate of the said alleged bankrupt found within the territorial jurisdiction of said court; and in pursuance thereof the said William H. Staake and John N. M. Shimer were appointed receivers of the said estate, and qualified as such and entered upon the duties of their office, and assumed possession of the said estate.

7. That pursuant to the prayer of the petition filed on the said 29th day of December, 1900, the said Roanoke Furnace Company was adjudged a bankrupt on the 27th day of March, 1901, and sub-

sequently, to-wit: on the 27th day of June, 1901, the said John N. M. Shimer was appointed trustee of its estate, and duly qualified as such, and entered upon the duties of his office; and took possession of the estate of the said bankrupt found within the territorial jurisdiction of the district court of the United States for the western district of Virginia.

8. That said Chester R. Baird by written contract made and entered into the 7th day of December, 1899, (but said contract was not recorded) sold to the Roanoke Furnace Company a certain furnace property lying partly in the city of Roanoke, and partly in the county of Roanoke, Virginia, commonly known as the West End Furnace property, and by deed of conveyance dated the 5th day of November, 1900, recorded in the clerk's office of the corporation court for the city of Roanoke, Virginia, on the 7th day of November, 1900, in Deed Book 125, page 149, and in the clerk's office of the county court of Roanoke county on the 8th day of November, 1900, in Deed Book 22, page 402, conveyed the said land and appurtenances known as the West End Furnace property, (being the same property which was attached by the First National Bank of Baltimore, Md., as hereinbefore stated) to the said Roanoke Furnace Company for the consideration therein named. That inasmuch as neither the contract nor deed from C. R. Baird to the Roanoke Furnace Company had been recorded at the time of the levying of the said attachment and filing of *lis pendens* by said bank, the property conveyed by such deed is to be deemed and taken under the laws of the State of Virginia to be the property of the said C. R. Baird, *quoad* the said attachment and no further; and that
12 said attachment was a valid lien under the laws of Virginia on the property levied on, as of the dates of said levies respectively, and is a present valid lien thereon, prior to the rights of the Roanoke Furnace Company, unless and except the same was made void by the bankruptcy act of 1898.

9. That both the said Baird, trading as aforesaid, and Roanoke Furnace Company were insolvent at the time of suing out and levying of the said attachment; that the deed of November 5th, 1900, from said Baird to the Roanoke Furnace Company was a valid conveyance to a purchaser in good faith, for a then fair consideration, and was not affected by the bankruptcy proceedings hereinbefore mentioned. That the consideration specified in said deed is as follows:

"That in consideration of the issuing and delivering of certain shares of the capital stock to the amount of $500,000.00 of the said Roanoke Furnace Company, in pursuance of a certain agreement between the parties hereto, the receipt heretofore of the certificates for which shares is hereby formally acknowledged" * * * "It is expressly understood and agreed, however, that this conveyance has been made subject to the payment by the Roanoke Furnace Company of the *balance* of the purchase money due, or to become due, to Robert E. Tod on the land of which the hereby granted

premises are a part, the payment of which balance of purchase money has been assumed by the said Roanoke Furnace Company."

That, as of November 5th, 1900, the amount due Robert E. Tod was something over $40,000.00, which amount was subsequently paid out of the proceeds from a sale of the property of the Roanoke Furnace Company.

10. That under and by virtue of decrees entered July 19th, 1902, by the district court of the United States for the eastern district of Pennsylvania, and subsequently entered in the ancillary proceedings in the district court of the United States for the western district of Virginia, said trustees exposed to sale, and sold the property located in the State of Virginia, known as West End Furnace property, and other property, that such sale was made without prejudice to the attachment of the said bank, and that such sale was confirmed by decrees entered by the aforesaid court, being entered in the ancillary proceedings in the western district of Virginia, on the 23rd day of August, 1902; that in each of said decrees it is provided as follows:

"It is further ordered, adjudged and decreed that out of
13 the purchase money aforesaid, the said trustees deposit to their joint credit, in the Philadelphia national bank, the sum of $42,500, to provide for the payment of the amounts which may be found to be due upon the following attachments, issuing out of the hustings court for the city of Roanoke, to-wit:

Plaintiff.	Amount.	Interest from.
First Nat. Bank of Baltimore	$12,000.	Oct. 22, 1900.

The said attachments, having been levied upon certain of the assets aforesaid as and for the property of Chester R. Baird, because of the non-recording of the deed therefor from him to the Roanoke Furnace Company, are hereby *specifically* charged upon the said fund as deposited, and the same shall be held to await the adjudication by a court of competent jurisdiction (*a*) of the validity of the said attachments as present liens upon the property aforesaid, and of the amount due thereon, and (*b*) of the person or persons (if any) entitled to enforce them."

11. That the proceeds from the sale of the property which was conveyed by the deed of November 5th, 1900, from C. R. Baird to the Roanoke Furnace Co. were not only sufficient to pay off and discharge all liens thereon prior to that of the First National Bank of Baltimore, but were also sufficient to pay off and discharge the lien of said bank, as evidenced by said attachment, principal, interest and costs.

That a sufficient part of the proceeds of sale from said property to pay off the amount due the First National Bank of Baltimore is now in the hands of said trustees under the last decrees aforesaid.

That the balance due said bank, exclusive of the costs incurred in the hustings court, is $8,152.06 with interest thereon at six per cent.

from the 11th day of November, 1902, as is shown by the statement hereto attached, as a part hereof, marked "Exhibit A."

12. The question of what court, State or Federal, has prior jurisdiction to pass upon and enforce said attachment shall not be affected either by the fact of a sale's having been made of the attached property by order of the Federal court, or the fact that the proceeds from such sale, etc., now held by the trustees aforesaid under and pursuant to decrees of said Federal court, but said question of jurisdiction shall be submitted to the district court of the United States for the western district of Virginia, in the ancillary proceedings in the matter of C. R. Baird & Co., bankrupt, and the Roanoke Furnace Company, bankrupt, as though the attached property had not
14 been sold, it being expressly understood that said bank contends, and by this agreement does not waive its contention, that as to its said attachment, and all questions pertaining thereto, the hustings court of the city of Roanoke has exclusive jurisdiction.

Should the said district court of the United States for the western district of Virginia, when determining said questions of jurisdiction, establish its own prior jurisdiction, then the question whether William H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Co., or the First National Bank of Baltimore, or neither of them, is entitled to the benefit of such attachment lien, is to be decided by said court on the facts herein agreed, and if said court shall establish the prior jurisdiction of the hustings court for the city of Roanoke, Virginia, then and in that event the said William H. Staake and John N. M. Shimer, trustees as aforesaid, will enter an appearace in the chancery cause pending in said hustings court, the short style of which is the First National Bank of Baltimore *vs.* C. R. Baird *et als.*, and more particularly set forth in sub-division 1 of this agreement.

And thereupon the said hustings court shall make and enter such orders and decrees as may to it seem proper upon said facts herein agreed, but this agreement shall not prejudice the rights of either party hereto to take an appeal from any decree that may be entered, at either the Federal or State court, which said party would have the right to take if this signature had not been made.

Witness the signatures of the parties hereto, this the 25th day of February, A. D., 1903.

WILLIAM H. STAAKE,
Trustee of the Estate of C. R. Baird, Trading as
C. R. Baird & Company, Bankrupt.
JOHN N. M. SHIMER,
Trustee of the Estate of the Roanoke
Furnace Company, Bankrupt.
FIRST NAT'L BANK OF BALTO.,
By J. D. FERGUSON, President.

15 Demurrer of First National Bank of Baltimore.

Filed Feb. 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Company, Bankrupt. In Bankruptcy.

The Demurrer of The First National Bank of Baltimore, Maryland, Defendant, to a Petition Filed Against it *et als.* by William H. Staake, Trustee for said Estate.

To the Hon. Henry Clay McDowell, judge of said court:

This defendant, by protestation, not confessing any of all of the matters and things in the petitioner's said petition contained, to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said petition, and for cause of demurrer, showeth:

1. Said petition, with the exhibits therewith filed, does not set forth or show such a state of facts as will give to this court jurisdiction over the property attached or to hear and determine any questions pertaining thereto.

2. The allegations contained in said petition, together with the facts and statements contained in the exhibit therewith filed as a part thereof, does not under the bankruptcy act of 1898 entitle said complainant to the relief prayed for; that is, that the attachment of this defendant be decreed null and void as to it, but that the same be preserved for the benefit of said petitioner.

Wherefore, and for divers other good causes of demurrer appearing in the said petition, this defendant doth demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said petition, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

FIRST NATIONAL BANK OF BALTIMORE,
By COUNSEL.

S. HAMILTON GRAVES, P. Q.

Affidavits waived.

16 Answer of First National Bank of Baltimore.

Filed Febr'y 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.

The Answer of the First National Bank of Baltimore, Maryland, to the Petition of William H. Staake, Trustee of Chester R. Baird, Trading as C. R. Baird & Co.

To the Honorable Henry Clay McDowell, judge of said court:

1. This respondent admits the allegations of section "1" of said petition.

2. This respondent for answer to the statements and allegations contained in section "2" of said petition, says: That it is not a party to the bankruptcy proceedings which are pending in the eastern district of Pennsylvania, consequently, it is not aware what amount of claims has been filed by said petitioner against the Roanoke Furnace Company; that it may be true that it has filed a claim for the sum of $158,757.55, as alleged, but this respondent emphatically denies that if there is such claim filed, that $85,000, or any part thereof, is due as unpaid purchase money on the property sold and conveyed by Chester R. Baird by deed of November 5th, 1900, to the Roanoke Furnace Company; and relies upon the statement of facts agreed, filed as a part of said petition.

3. This respondent admits that the allegations contained in section "3" of said petition are true.

4. This respondent does not admit that a decree was entered, as is set forth in subdivision "4" of said petition, whereby the said William H. Staake, trustee, was authorized to proceed in a proper manner to have himself subrogated, etc. This respondent is not a party to said suit, has no knowledge of and is not bound by any order therein.

This respondent admits that the receiver's certificates mentioned in said petition have been paid off and discharged, and alleges that the same were sold when issued and the proceeds therefrom
17 applied to the balance due Robert E. Tod on the purchase price of the property conveyed by Baird to the Roanoke Furnace Company, and further alleges that said receiver's certificates were subsequently paid off and discharged out of the proceeds from a sale of said property.

This respondent, furthering answering, most emphatically denies that the insolvency of Chester R. Baird, at the time of the levying of its attachment against the Roanoke Furnace Company, is to the

prejudice of said attachment, or that the same is null and void under the bankruptcy act of 1898, and most emphatically denies the right of this court to enter an order preserving said attachment for the benefit of said petitioner, but alleges and charges that this respondent is entitled to the benefit of said attachment, and said property, when sold, having brought sufficient, not only to pay all liens thereon which were prior to said attachment, but also sufficient to pay said attachment, that this respondent is entitled to have the court enter an order directing that the amount unpaid under said attachment, should be paid to this respondent.

This respondent, further answering, says that it denies each and every allegation in said petition contained, which is not herein specifically admitted, unless and except the same be supported by the agreed statement of facts filed with said petition.

This respondent denies that the court of bankruptcy has jurisdiction to pass upon the question raised by said petition, and this respondent by answering does not waive its right to object to said jurisdiction. This respondent, in the event the court should determine that it has jurisdiction, then and in that event it prays that an order be entered directing the payment to it of the balance due on its said attachment.

FIRST NATIONAL BANK OF BALTIMORE,
By COUNSEL.

S. HAMILTON GRAVES, P. Q.

Affidavit waived.

18 Answer of John N. M. Shimer, Trustee.

Filed Feb'y 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Company, Bankrupt. In Bankruptcy.

In the Matter of ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

Answer of John N. M. Shimer, trustee of the estate of Roanoke Furnace Company, bankrupt, to petition of William H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt.

To the Honorable Henry Clay McDowell, judge of said court:

1. Your respondent is the trustee of the estate of Roanoke Furnace Company, bankrupt, having been appointed and qualified as such in proceedings pending in the district court of the United States for

the eastern district of Pennsylvania, whereof this honorable court has assumed ancillary jurisdiction.

2. Your respondent admits the averments contained in said petition.

3. Your respondent shows that the attachments should be deemed null and void as respects the rights of the present plaintiffs, but that to continue such attachments for the benefit of the trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, without more, would have the effect of enabling the said trustee to enforce these claims of large amounts against this estate, in addition to the claim he has already filed as set forth in the petition.

Your respondent therefore respectfully suggests that if the attachments thus be continued, the petitioner be required to abate his said claim filed by the amount of the said attachments.

JOHN S. M. SHIMER,
Trustee for, &c.

Affidavit waived.

19 Opinion of the Court.

Filed Jan'y 14th, 1901.

United States District Court, Western District of Virginia.

In re C. R. BAIRD, Bankrupt,
and
In re ROANOKE FURNACE COMPANY, Bankrupt.

C. R. Baird, who did business under the name of C. R. Baird & Co., was the owner of certain real estate situated in this district, consisting of (1) the West End Furnace property; (2) certain mines, houses, rights of way &c., and (3) a rolling mill.

On December 7th, 1899, Baird, by written contract, sold the Furnace property to the Roanoke Furnace Company, in consideration of the issue to Baird of certain shares of the vendee's capital stock and the assumption by the vendee of a purchase money debt owing on the furnace by Baird to R. E. Tod. This contract was never recorded. On November 5, 1900, Baird executed and delivered to the Roanoke Furnace Company a deed in pursuance of the above mentioned contract, conveying the furnace property, which deed was forthwith recorded.

On October 13, 1900, Baird conveyed to the Roanoke Furnace Company the mines, houses, &c., but these deeds were not recorded up to the time that the petition in bankruptcy against Baird, hereafter to be mentioned, was filed.

The title to the rolling mill remained in Baird.

Between October 12th and 31st, 1900, at which time Baird was

insolvent, some of Baird's creditors sued out from the corporation court of the city of Roanoke, Virginia, attachments which were levied on all three of the above mentioned properties.

On December 24, 1900, other of Baird's creditors filed in the district court for the eastern district of Pennsylvania a petition in bankruptcy against him. In due course that court adjudicated Baird a bankrupt. Early in the course of this proceeding, ancillary jurisdiction was taken of the cause by this court.

On December 29, 1900, an involuntary petition against the Roanoke Furnace Company was filed in the said Pennsylvania court, followed by an adjudication. Ancillary jurisdiction of this cause was also taken by this court.

All of the above mentioned properties have been sold by order of court and the proceeds are deposited to the joint credit of
20 Staake, trustee of Baird's estate, and Shimer, trustee of the furnace company estate, to await the determination of the questions hereinafter discussed.

By the registry statutes of this State unrecorded contracts of sale and conveyances of real estate are void as to, at least, lien creditors.

The questions here are presented by a petition filed by Staake, trustee, praying that the attachments above mentioned be declared void as regards the creditors who sued them out, but preserved for the benefit of Baird's estate; by a demurrer to this petition filed by the attaching creditors; by an answer to the petition filed by Shimer, trustee of the furnace company estate, praying that if the benefit of the attachments be given to the trustee of Baird's estate he be required to correspond-ly abate his claim against the furnace company estate; and by a supplemental answer by Shimer, trustee.

At the hearing all objections to the jurisdiction of this court were withdrawn, and jurisdiction is taken by express consent of all parties.

The demurrer to the petition is intended to raise merely the question as to whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

By 67*f* of the bankrupt law, all attachments obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt; and the property affected by the attachment shall be deemed wholly discharged and released from the same, and shall pass to the trustee as part of the estate of the bankrupt, unless the court shall on due notice order that the right under such attachment shall be preserved for the benefit of the estate. In the case at bar the attachments were obtained through legal proceedings against Baird, within four months of the filing of the petition against him, and he was insolvent at the time. The language of this section so exactly fits the case we have here that some cogent reason must be found before we can properly hold that it does not apply.

Counsel for the attaching creditors, in an unusually excellent

argument, take the position that the case at bar is not within the intent of the bankrupt law. They argue that it is so unjust and inequitable to take from the attaching creditors the fruits of their diligence and give them to all creditors pro rata, that Congress could not have intended the act to apply in a case such as we have here.

Nevertheless, counsel for these creditors necessarily admit
21 that if Baird had never conveyed the furnace, or if his grantee had never recorded the deed, or if Baird had made a fraudulent conveyance, the act plainly takes from the attaching creditors the fruits of their diligence and gives them to all the creditors pro rata. The argument that the law is unjust or inequitable is certainly as strong in any of the three supposed cases as in the case at bar. While the State law gives to diligent creditors who attach a priority of payment, a preference, over those who do not attach, it is beyond dispute that the intent of the bankrupt law (except as to rights gained more than four months before the filing of the petition in bankruptcy) is just the reverse. The intent of the latter, except as aforesaid, is to prorate all available assests and to prevent any priority of payment being obtained by any creditor within the four months, whether by consent of the debtor or by the diligence of the creditor. Such being the intent of the law, it seems to me that the argument based on the supposed injustice of the act as applied to case at bar is not of weight. Such being the intent of the law, it would be surprising if Congress had omitted to provide for the not uncommon state of facts which we have here. And, as above remarked, the language of 67*f* seems entirely adapted to the case we have here, as well as to other possible cases. In cases where the title to the attached property remains in the bankrupt, the liens of attaching creditors are simply annulled and the proceeds of the property are divided pro rata among all the creditors. In cases where the bankrupt has made a fraudulent conveyance, this deed is by proper proceedings set aside, the attachments are annulled and the proceeds of the property are prorated among all the creditors. In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the pro rata benefit of all the creditors.

It is further argued that the case at bar is not within the intent of the act, because the right here contended for by the trustee is not mentioned in section 70*a* of the act. This argument does not seem to me to be of force. Section 70*a* is an enumeration of those properties the title to which passes to the trustee by operation of law. The right here asked for by the trustee can be given him only by order of court. It would have been inconsistent, even absurd, to have provided in 70*a* that the rights of attaching creditors, in a case such as we have here, shall vest in the trustee by operation of law, when it had been provided in 67*f* that such rights should be vested in the trustee by order of court.

22 It was further argued that the power to preserve and enforce liens for the benefit of all the creditors is given only as to liens that may be annulled under 67*f*; that only liens which give a preference are thus to be annulled, and that the liens here do not give a preference. While the argument is ingenious, I cannot assent to its soundness. If the attaching creditors are allowed to have the exclusive benefit of their liens, I do not see why they are not in effect allowed a preference. In such event they will be paid in full, while the other creditors will receive only a small proportion of their claims. Again, 67*f* is not confined to liens that create a preference. Its language expressly embraces all liens obtained as were the liens in the case at bar.

Considerable effort was expended in argument on the proposition that an unrecorded contract of sale, or deed, is made void by the Virginia statutes only as to lien creditors, and that, even if there were doubt about this as a legal proposition, clause 9 of the agreed facts in effect so states. I see no necessity of discussing these questions. If it were admitted that the right contended for by the trustee had to be found in 70*a* before such right could be given him, this point might be of considerable interest. But, as above stated, this right could not properly have been mentioned in 70*a*. The power of the court, and, indeed, its duty, to take away from the attaching creditors the benefit of their liens and give it to the trustee is found specifically in 67*f*. To thus construe this section is in line with the undoubted policy of the act; and its language is so sweeping and general that I am constrained to believe that had Congress not intended such cases as we have here to fall within its purview, some specific provision would have been made excepting such cases.

So far as this branch of the case is concerned, I am of opinion that an order should be made subrogating the trustee to the rights of the attaching creditors in the fund derived from the sale of the furnace property.

By request of counsel for the attaching creditors, and as the questions have not been argued, I do not now express an opinion on the questions presented by the answer and supplemental answer of Shimer, trustee.

Since the foregoing opinion was sent to counsel a petition has been filed by counsel for certain of the attaching creditors, praying that an allowance be made to counsel out of the fund now under the control of the court. Staake, trustee, demurred to the petition.

The fund in question would not exist but for the services of
23 counsel. Had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company. Under such circumstances, equity treats the fund as charged with the claims of counsel for a reasonable allowance. I do not find any provision of the bankrupt act which deals with this question, nor any provision which seems to me to debar such an allowance. The fund should, I think, be treated as having come under the control of this court subject to this charge.

In making such allowance the court is not distributing the bankrupt's estate; but is directing the payment of a prior lien or charge on the fund, and only the balance left after such payment can properly be treated as the estate of the bankrupt.

Having announced to counsel that I would overrule the demurrer, an answer to the petition has been filed by the trustee.

The authorities cited in the answer do not seem to me to hold that a reasonable allowance would be improper under the circumstances of this case. In support of the reasonableness of the amounts prayed for in the petition, sundry depositions of members of the bar have been taken. On a question of fact the court is bound by the weight of the testimony. But in this case the question of fact is as to what the services of counsel were, and as to this there is no dispute. The question as to what is a reasonable allowance for such service is one on which the opinions of members of the bar can properly have only advisory force. It is the duty of the court to decide what sum is reasonable, and this duty can not be shifted to expert witnesses. Out of deference to the opinions of the members of the bar who have testified, I make the allowances somewhat larger than I should have done had the question been submitted without these depositions; but I cannot allow the sums prayed for. It appears that the minimum fee allowed by the rules of the Roanoke Bar Association is 10 % on the first $1,000 and 5 % on the balance. This it is said is the scale for collections made without suit. All things considered, I have concluded that ten per cent. of the first $5,000 and 5 % of the next $5,000 and three per cent. of the balance is as much as is reasonable here. Especially so as I am satisfied that very few of the bar of this State (where fees are not extremely high), would decline to do the work that was done here for these fees.

The chief item of labor in the services of counsel was the title examination necessary to learn what real estate could be attached; but this was done only once, at the most, by each of the
24 counsel. The allowances, therefore, should be computed on the aggregate of the claims represented by each firm or individual.

The order may direct that Messrs. Scott & Staples be paid ten per cent. of the first $5,000 and five per cent. of the balance, if any, of the aggregate of principal and inter- of the claims of Huff, Andrews & Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt, and Central Manufacturing Company.

That A. B. Coleman, Esq., be paid ten per cent. of the aggregate of principal and interest of the claims of Fairfax & Bell and Standard Oil Company.

That S. Hamilton Graves, Esq., be paid ten per cent. of the first $5,000 and five per cent. of the balance of principal and interest of the claim of First National Bank of Baltimore.

That Messrs. Watts, Robertson & Robertson be paid ten per cent. of the first $5,000, five per cent. of the next $5,000 and three per

cent. of the balance of the claim of Virginia Iron, Coal & Coke Company.

That Messrs. Cocke & Glasgow be paid ten per cent. of the principal and interest of the claim of the West End Supply Company.

HENRY C. McDOWELL.

Decree of Court.

Entered January 14th, 1904.

United States District Court, Western District of Virginia, at Lynchburg.

In re C. R. BAIRD, Bankrupt,
and
In re ROANOKE FURNACE COMPANY, Bankrupt.

These causes having been argued by counsel, upon consideration thereof it is adjudged, ordered and decreed as follows:

1st. That for reasons stated in a written opinion, the demurrer of the attaching creditors to the petition of Wm. H. Staake, trustee, be, and the same is hereby, overruled.

2nd. And the attaching creditors having by leave of court filed their answer to said petition, to which the said trustee replied generally, it is further adjudged, ordered and decreed:

That the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by the attaching creditors, to-wit: the Virginia Iron, Coal & Coke Company; Huff,
25 Andrews and Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt; Fairfax & Bell; Central Manufacturing Company; Standard Oil Company; West End Supply Company, and the First National Bank of Baltimore, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, Wm. H. Staake, trustee of the said estate, be, and he is hereby, subrogated to said rights, and authorized and empowered to enforce the said attachment liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings intervened.

3rd. Without at this time deciding or considering any other question, it is further adjudged, ordered and decreed that Wm. H. Staake trustee, and John N. M. Shimer, trustee, are directed to collect the funds heretofore deposited by them under the agreement, known as the agreement No. 1, and to pay over the same to the said Wm. H. Staake, trustee, to be by him held subject to the orders of this court.

4th. And upon the hearing of the petition of counsel for the attaching creditors, and the demurrer of Staake, trustee, thereto, it is ordered that the said demurrer be, and it is hereby, overruled, and

the said trustee having answered said petition, upon consideration of the arguments of counsel and for reasons set forth in a written opinion, it is hereby ordered that the said trustee pay to Messrs. Scott & Staples ten per cent. of the first $5,000 and five per cent. of the balance, if any, of the aggregate of principal and interest of the claims of Huff, Andrews & Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt and Central Manufacturing Company.

To A. B. Coleman, Esq, ten per cent. of the aggregate of principal and interest of the claims of Fairfax & Bell and Standard Oil Company.

To S. Hamilton Graves, Esq., ten per cent. of the first $5,000 and five per cent. of the balance of principal and interest of the claim of First National Bank of Baltimore.

To Messrs. Watts, Robertson & Robertson ten per cent. of the first $5,000, five per cent. of the next $5,000 and three per cent. of the balance of the claim of the Virginia Iron, Coal & Coke Co.

That Messrs. Cocke & Glasgow be paid ten per cent. of the principal and interest of the claim of West End Supply Company.

5th. It is further ordered that the trustee will make no disbursements under this order until ten days from the entry hereof shall have elapsed.

26 MEMORANDUM.—Whereas some or all the parties may appeal from, or petition for revision of, some part or all of the foregoing decree, it is further ordered that in the event any party shall, within ten days from this date, appeal from, or petition for revision of, any part of this decree, such part of such decree shall be superseded pending the adjudication by the appellate court.

HENRY C. McDOWELL, Judge.

Enter Jan'y 14, 1904.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Western District of Virginia, } *ss:*

I, William McCauley, clerk of the district court of the United States for the western district of Virginia, at Lynchburg, do hereby certify that the foregoing are true copies of proceedings had and certain papers filed in the matters of C. R. Baird, trading as C. R. Baird & Co., bankrupt, and the Roanoke Furnace Company, bankrupt, pending in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Lynchburg, in said district, this 1st day of February, A. D., 1904, and in the 112th year of the Independence of the United States of America.

[Seal of the Court.]

WM. McCAULEY, Clerk.

Cost of transcript of record $13.10.

Demurrer to Petition.

Filed Feb. 8, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.
and
In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

The demurrer of William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, bankrupt, to the petition for review filed by the First National Bank of Baltimore, Md., on the 22d day of January, 1904.

27 This defendant by protestation, not confessing or acknowledging any or all of the matters and things in the said petition contained, to be true in such manner and form as the same are therein set forth and alleged, doth *doth* demur to the said petition; and for causes to demur showeth:

That said petition is not sufficient in law; it appearing by the plaintiff's own showing by the said petition that it is not entitled to the relief prayed for by the petition against this defendant; wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said petition, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

S. GRIFFIN,
Solicitor and of Counsel for the Defendant, William H. Staake, Tr. of C. R. Baird, Trading as C. R. Baird & Company.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

S. GRIFFIN,
Of Counsel for Defendant, Wm. H. Staake, Tr. of C. R. Baird, Trading, as C. R. Baird & Company.

The affidavit that the above demurrer is not interposed for delay is hereby waived.

S. HAMILTON GRAVES,
Att'y for Petitioners.

28 Answer.

Filed Feb. 8, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.
and
In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

The answer of William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, to the petition of the First National Bank of Baltimore *et als.*, respectfully shows to this court:

1. That this respondent has lately exhibited and filed in the district court of the United States for the western district of Virginia, his petition against the said First National Bank of Baltimore *et als.*, upon which petition and the proceedings thereunder the decree complained of in the petition for revision was had.

Respondent further says that all and singular the allegations in said petition of respondent as therein made are true, and that respondent refers to the same, and makes the same and the allegations thereof a part of this answer, the same as if fully set out and incorporated herein.

2. Respondent further says, that the facts of this case are all matters of record, and that so far as said petition sets out the facts as contained in the record, he admits them to be true, but so far as there is any variance, respondent denies that the facts set out in said petition for revision are true.

And now having fully answered, he prays to be hence dismissed.

WM. H. STAAKE,
Trustee of C. R. Baird, Trading as C. R. Baird and Co.,
By COUNSEL.

S. AND U. GRIFFIN, P. D.

29 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupt, *et al.*, Respondents. } No. 532.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, Lynchburg.

Jan. 22, 1904, petition to superintend and revise is filed, and the cause is docketed.

Same day, copy of petition, with notice to respondents to answer,

demur or move to dismiss within fifteen days mailed to S. Griffin, attorney for respondents.

Feb. 3, 1904, transcript of record is filed.

Feb. 8, 1904, demurrer to petition is filed.

Same day, answer to petition is filed.

March 16, 1904, 20 copies of printed record are filed.

May 12, 1904 (May term, 1904), cause came on to be heard and is argued before Judges Goff, Morris and Purnell, and submitted.

Nov. 15, 1904, (November term, 1904), the court announced and filed its opinion, which is as follows, to-wit:

30 Opinion.

Filed Nov. 15, 1904.

United States Circuit Court of Appeals, Fourth Circuit.

RECEIVERS OF THE VIRGINIA IRON, COAL AND COKE CO. *et al.*, Petitioners,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt, *et al.*, Respondents. } No. 531.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt, *et al.*, Respondents. } No. 532.

WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt, *et al.*, Petitioners,
vs.
J. ALLEN WATTS, WILLIAM GORDON ROBERTSON, and Edward W. Robertson *et al.*, Respondents. } No. 533.

Petitions to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg. In Bankruptcy.

31 WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt,
vs.
WATTS, ROBERTSON & ROBERTSON, A. B. COLEMAN, S. H. Graves, Scott & Staples, and Cocke & Glasgow. } No. 538.

Cross-appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg.

(Argued May 12 and 13, 1904; Decided Nov. 15, 1904.)

Before Goff, Circuit Judge, and Morris and Purnell, District Judges.

Wm. Gordon Robertson, S. Hamilton Graves and A. P. Staples for petitioners, and Arthur G. Dickson, Samuel & M. Griffin, John

Dickey, and Samuel W. Cooper for respondents in 531 and 532; Samuel W. Cooper, Samuel & M. Griffin, and Arthur G. Dickson for Staake, trustee; and Wm. Gordon Robertson and A. P. Staples for respondents and appellees in Nos. 533 and 538.

Statement.

The facts in these proceedings have been agreed upon and are as follows:

Chester R. Baird, trading as C. R. Baird & Co., on December 7th, 1899, owned certain real estate in Virginia, known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to-wit, shares amounting to $500,000 of the capital stock of the said Roanoke Furnace Company.

Under the contract of sale the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the company executed by Baird until November 5th, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000, against
32 Baird as a non-resident of Virginia were issued at the instance of certain of his creditors, and were levied upon the furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the furnace company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the furnace company a lien upon the property so levied upon.

(Code of Virginia, 1887, sections 2463, 2464, 2465, 2472.)

Within four months from the levying of the attachments, to-wit: on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States district court for the eastern district of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the district court of the United States for the western district of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

Under orders of court the property conveyed by Baird to the furnace company was sold and the rights and claims of all the parties

were transferred to the fund derived therefrom and all these claims were submitted to the determination of the court below by express consent of all the parties.

Upon the issues made by the petitions and answers the court below ruled that the attachments against Baird, having been obtained through legal proceedings against him, when he was insolvent and within four months prior to the filing of the petition in bankruptcy against him, were null and void under section 67*f* of the bankruptcy act of 1898, so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the benefit of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate, and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done, had not the bankruptcy proceedings interfered. The district court also ruled that the trustee took these liens to
33 the claim for compensation of the attorneys who procured the attachments and directed that out of the fund derived from the attachments the reasonable fees of the attorneys representing the attaching creditors should be paid. The grounds upon which the learned district judge based his rulings are ably stated in his opinion filed in the case. These two rulings are the subject of the present cross petitions for revision.

MORRIS, district judge, delivered the opinion of the court:

Section 67*f* provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of *a bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent, and that the court has on due notice ordered that the right under the attachments shall be preserved for

the benefit of the estate and pass to and be preserved by the trustee for the benefit of the estate. There is therefore in the facts of this case a literal gratification of the words of this section. It is contended, however, that as the first clause of the section makes null and void the liens thereon mentioned and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of the clause of 67*f* can have reference only to liens on property, which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.

34 We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee.

A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors does produce equality and prevent preferences.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. This distinction is clearly stated in the following citation from *In re* New York Economical Printing Company, 110 Fed. Rep., 514, quoted by the Supreme Court of the United States in Hewit *vs.* Berlin Machine Works, 194 U. S., 302, "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceeding acts, contemplates that a lien good at that time as against the debtor and as against all his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In the present case the sale by the bankrupt was void as against attaching creditors for want of a recorded deed. The property was levied upon by creditors, and by virtue of the attachments might have been sold under judicial process against the bankrupt. The levy was within four months of the filing of the petition in bankruptcy and under section 67*f* the lien is preserved for the benefit of his estate. In the case of *In re* New York Economical Printing Co., above cited, Judge Wallace, speaking of the right of a trustee in bankruptcy to treat as invalid a chattel mortgage which was not filed in compliance with the laws of New York, and which, under

the decisions in that State, could be treated as invalid only by creditors who had obtained judgments and acquired a lien, proceeded further to say: "Subdivision *b*, sec. 67 (act of 1898), pre-
35 serves for the benefit of the estate in bankruptcy, a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor by an execution, or a creditor's bill, has secured a legal or equitable lien upon mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien would inure to his own exclusive benefit; but if acquired at any time within four months it would be null and void under subdivision '*f*' of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision '*b*.'"

It is urged that by giving to the trustee of the bankrupt's estate the benefit of the attachments the court is taking from the attaching creditors property which did not belong to the bankrupt and could not have passed to his trustee, but which was a right which the law of Virginia, because of a policy of its own, gave to the creditors in a property which did not in fact belong to the bankrupt.

We think that the Virginia law may well be considered as giving the right to the attaching creditor because *quoad* the attaching creditor the law regards the property so attached as to that extent still remaining the property of the bankrupt because of the want of a proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird that the attachments are liens at all.

We consider the language of section 67*f* so mandatory and imperative that we arrive at the conclusion that the ruling of the court below must be sustained.

The other question is as to the allowance of a reasonable compensation to the attorneys who represented the attaching creditors and whose proceedings produced the fund which now is to pass to the trustee of the bankrupt.

The attaching creditors, in good faith and in a justifiable exercise of the right given to them by the Virginia law, employed counsel to institute proceedings to seize the property which the bankrupt, as it now appears, had sold. By virtue of that seizure and solely by virtue of it, and to the extent of the seizure, the proceeds of those proceedings now pass to the trustee.

The equity of the claim for compensation to be paid out of the fund is very strong.

It is clearly a case in which by an appropriation which the bankrupt law makes of a fund which came into existence and was
36 preserved by the legal proceedings instituted by the attaching creditors all the common creditors without distinction are

benefited. The fund which otherwise the attaching creditors would have secured for their own benefit the bankrupt law says shall be shared equally among all the creditors.

The fund was brought into existence by the exertions of the attaching creditors, and should be considered as in the same class as a fund arising under a creditors' bill, because the bankrupt act declares it shall be so treated. The fund comes into the hands of the trustee of the bankrupt burdened with the charges which were necessarily incurred to bring it into existence. It would appear eminently proper in such a case that the bankruptcy court should in its discretion allow such reasonable counsel fees and expenses as were necessarily incurred in the prosecution of the suits.

Trustees vs. Greenough, 105 U. S., 527–534.

The court below carefully considered the amounts proper to be allowed, and with all the facts before it fixed the allowances. We do not find that injustice has been done either to the counsel of the attaching creditors or to the estate of the bankrupt, and we approve the allowances as fair and just.

The orders of the court below are *affirmed*.

PURNELL, district judge, dissenting:

I cannot concur in the foregoing opinion. Upon the facts agreed and the law stated, it is evident to my mind that Congress did not mean by section 67*f* of the bankruptcy act of 1898, to provide for the maintenance or preservation of liens such as those set out in this case. If the attachments were void no lien was acquired thereunder, and if void for one purpose they were void for all purposes. They were not in favor of the bankrupt, but for debts due by him, and I cannot agree that even under the act of Congress a court of bankruptcy can convert a debt or liability into an asset. The trustee under the bankrupt law takes only such property as the bankrupt is entitled to. He was not only entitled to nothing under these attachments, but he was the debtor whose property was attached.

And as to the other question, to-wit: the allowance of reasonable compensation to attorneys who represented attaching creditors and whose proceedings produced the fund, if the fund is to be retained in the bankrupt court, I concur in the opinion that there should be allowance of reasonable compensation, but as to the other question I most respectfully dissent.

37 & 38 Nov. 18, 1904, (same term), the court made and entered the following judgment, to-wit:

Judgment.

Filed Nov. 18, 1904.

United States Circuit Court of Appeals, Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupts, *et al.*, Respondents. } No. 532.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg.

This cause came on to be heard upon the petition, demurrer, answer and the transcript of the record of the proceedings of the district court of the matter for review, and was argued by counsel and submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court, in the matter brought up for review, be, and the same is hereby affirmed, costs will be paid by said trustee.

It is further ordered, that the clerk of this court transmit a copy of this judgment to the said district court forthwith.

NATHAN GOFF.

Nov. 18, 1904.

Nov. 22, 1904, mandate stayed until Dec. 10, 1904, to allow petitioner time to present petition for a rehearing.

39 Petition for a Rehearing.

Filed Dec. 9, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

Petition for Rehearing.

Filed by First National Bank of Baltimore.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
vs.
WM. H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt-, *et al.*, Respondents. } No. 532.

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

Your petitioner, with all deference to the court, most respectfully asks that it be granted a rehearing upon the record herein, and upon

the majority opinion rendered November 15th, 1904, and that the decree entered on November 15th, 1904, be annulled, and that in lieu thereof, a decree be entered in conformity with the prayer of the original petition filed in this court.

In addition to the severe consequence to petitioner (the total loss of its debt; this is the necessary result, since the claims proven as shown by the original record exceed fourteen hundred thousand dollars, exclusive of interest, and petitioner is advised that the other property of the bankrupt-, to-wit, that located in the States of
40 New York, Pennsylvania and New Jersey, has been sold for a comparatively small sum to a combination of the larger creditors), the effect of the majority opinion is so far-reaching, standing, as it does, without a precedent, and by the construction given to section 67–F, makes Congress exceed the power conferred upon it by the Constitution, and over-rides a rule of law settled and established by the United States Supreme Court, and upon the question of "what constitutes a preference," is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit, your petitioner respectfully urges that it be reheard and assigns the following grounds:

1st. The opinion ignores the effect of the most pertinent facts of this case, to-wit: That C. R. Baird sold the furnace property on December 7th, 1899, by a contract valid as to him and his general creditors; and that he executed a deed to the Roanoke Furnace Company, dated November 5th, 1900, and which was recorded on the 7th day of November, 1900.

2nd. The construction placed upon section 67–F, is erroneous; and, if correct, makes the bankruptcy act exceed the constitutional limitations placed upon Congress, extends its operation beyond the limits fixed by the Supreme Court, and results in unreasonable consequences.

3rd. Upon the question of "what constitutes a preference," as that term is used in the bankruptcy act, the opinion is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit.

As to the first ground: The court, fully appreciating the fact that under the terms of the bankruptcy act, and in conformity with the decisions thereunder, in order to sustain the contention of the trustee, it must first ascertain that the attached property was that of the bankrupt, as of the date the petition was filed against him, on page 6 of its opinion, says:

"We think that the Virginia law may well be considered as giving the right to the attaching creditors, because *quoad* the
41 attaching creditor, the law regards the property so attached as to that extent still remaining the property of the bankrupt, because of the want of proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird, that the attachments are liens at all."

This is unquestionably correct prior to, but not subsequent to,

November 7th, 1900, since as of that date every vestige of interest, legal or equitable, because of the record of a valid deed, passed from Baird, and under the laws of Virginia, neither he, or any one claiming under him, or any creditor of his, either had or could acquire, any interest therein, or lien thereon, because of his previous ownership.

The proposition that, a lien upon property, to the extent of its amount, preserves an ownership in that property, in the debtor, as against his subsequent valid deed, for a full and fair consideration, is to us incomprehensible. Such a rule of law would, as was in effect said by the dissenting judge, "convert a liability into an asset." It would create a new and novel form of ownership, neither founded in reason, or sustained by authority. Suppose, for instance, that the Roanoke Furnace Company had on November 7th, 1900, the date it recorded its deed (which was nearly two months prior to the date the petition was filed against Baird), paid to petitioner the amount of its lien, dissolved the attachment, released the *lis pendens*, and dismissed the suit; could it have been successfully contended in any court, then, or at any subsequent time, by any person whatsoever, that petitioner had disposed of, and the Roanoke Furnace Company, in so doing, had purchased an asset or property belonging to Baird? Unquestionably not. The lien was petitioner's, and the property was that of the Roanoke Furnace Company, and had been for over a year prior to the filing of the petition against Baird.

We are, with all respect to the court, forced to the belief, that it, when considering this case, either lost sight of the contract
42 of purchase and sale dated December 7th, 1899, and of the deed of November 5th, 1900, or failed to appreciate the force and effect of these instruments under the laws of Virginia. Under the laws of this State, the ownership of the furnace property passed under the written contract from Baird on December 7th, 1899. The written contract was valid as to Baird, and as to his general creditors, and was void only as to his lien creditors, as was admitted by respondent counsel during the oral argument.

As to the second ground: The construction placed upon sec. 67–F, is erroneous; and if correct, makes the bankruptcy act exceed the limitations placed on Congress by the Constitution, and extends the operation of the act beyond the limits fixed by the Supreme Court, and results in most unreasonable consequences. It is submitted that in construing the various provisions of the bankruptcy act, it must be constantly borne in mind, that the act deals only with the estate of the bankrupt; that the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the bankrupt's property, and that rights become vested as of the date the petition is filed.

Aside from the cases cited in the brief, the attention of the court is called to Pierie *vs.* Chicago Title & Trust Company, 182 U. S., 449; 45 Law Ed., 1178, in which the court used this language:

"It is hardly necessary to assert that the object of a bankruptcy act,

so far as its creditors are concerned, is to secure equality of distribution among them of *the property of the bankrupt.*"

Mr. Justice Catron, in the case *Re* Klein, which is cited and approved in Hanover National Bank *vs.* Moyses, 186 U. S., 185; 46 Law Ed. 1118, in discussing the constitutional provision for a national bankrupt act, said:

"Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: To what limits is that jurisdiction
43 restricted? I hold it extends to all cases where the law causes to be distributed *the property* of the debtor among his creditors. This is its least limit."

Mr. Chief Justice Waite, in the case *In re* Deckert, which case was cited and approved in Hanover National Bank *vs.* Moyses, *supra*, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

"But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operations, only such property as could by judicial process be made available for the same purpose. * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

In the case of Hewitt *vs.* Berlin Machine Works (194 U. S., 302), cited by this court in its opinion, p. 5, the limitations of the act *was* clearly defined when the court used this language:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt, or to his creditors at the time when the trustee's title accrues."

We take it, that in construing sec. 67–F, the court must be bound by the principles above established; that is, that the only lien which can be affected by that section, is a lien which is upon property which can pass to the trustee of the bankrupt; that is, confine its operation to such property as other process could reach as of the date the petition was filed. This court in its opinion, on page 5, says:

"The wording seems clearly to contemplate that a creditor
44 might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted, preserving the lien, if the court should so order, for the benefit of the estate, and vesting it in the trustee."

By this construction, the act is made to deal with the property of a third party; it imposes a penalty upon a creditor of a bankrupt, by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party, may have had upon the estate of the bankrupt. It

brings into the estate, as an asset, the proceeds from a lien not upon that estate, and one which no process from any court—State or Federal—could have reached as of the date the petition was filed. Such construction, in effect, and in fact, in the case at bar, creates an asset. Assume, for the purpose of illustration, that no sale has yet been made of the furnace property by the Federal court; that under the decree in this case, Staake, trustee, applied to the hustings court of Roanoke city, and was made plaintiff in petitioner's attachment suit there pending; that the Roanoke Furnace Company then appeared and filed its plea, setting up the covenants contained in the deed of November 5th, 1900, from Baird to it. The only replication to such a plea must be, that the trustee is not enforcing the lien because of any interest then, or ever had therein, by the bankrupt grantor, but because of a property right created in the trustee by sec. 67-F of the bankruptcy act. If the trustee was proceeding because of any right or interest which may have existed in the bankrupt, it must defeat the attachment lien, for no one can enforce a lien against his solemn covenant in an instrument under seal.

It is submitted that the proposition involved in the above quota, tion, to-wit, that there may be a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy-

is a pioneer. After a most careful search, we have been
45 unable to find any decision of any court, which held that the bankrupt act avoided a lien on any property whatsoever, other than that of the bankrupt which passed to his trustee. It is submitted that the real and true purpose of sec. 67-F, was to procure equality of distribution of a bankrupt's *assets* among his creditors without preference. An apt illustration of the beneficial effect of the provision quoted, is to be found in the case *In re* Economical Printing Co., which is cited in the opinion, and reported in 110 Fed. Rep., p. 514. In that case, the printing company had mortgaged certain property. Because of the mortgagee's failure to comply with the registry laws of the State of New York, it was contended that the property passed to the trustee free and discharged from the mortgage. This proposition, however, was denied by the court. The mortgaged property, of course, passed to the trustee. A lien had been secured upon that property within the prohibited period of four months. The court held, and very properly held, that the trustee was entitled to the benefit of that lien. Now this presents a case where the lien was taken from the creditor; since the mortgage was held valid, *quoad* the trustee, it would appear that the same results would have been secured to the estate by simply avoiding the judgment lien, as was secured by subrogating the trustee.

We wish to illustrate to the court, a case which might arise, in which the right to preserve the lien would be of material benefit to the estate, and thereby demonstrate the true purpose of the provision in question.

Under the laws of Virginia, in a suit to set aside a fraudulent con-

veyance, priority is given, not to the first creditor who institutes his suit for that purpose, but to the first creditor who, after instituting his suit, files and causes to be recorded a *lis pendens*. Now, to illustrate: In June a creditor filed a bill to set aside as fraudulent a deed made by his debtor, but he does not record the *lis pendens* provided by statute. In September another creditor files his bill for
46 the same purpose, and does record his *lis pendens*. In November the deed is declared null and void, and in December the debtor is adjudged a bankrupt, and the property so fraudulently conveyed passes to his trustee. The word "creditor" in Virginia, means lien creditor, and hence it is not necessary, under the act, that the plaintiff filing his bill in June, should have filed a *lis pendens* as to the general creditors of his fraudulent debtor. Therefore, his lien being four months anterior to the adjudication of bankruptcy, is unaffected by the bankrupt laws, and is valid as against the general creditors of the debtor. The lien of the second petitioning creditor being within four months of the filing of the petition, is void under the bankrupt law. Now comes the beneficial effect of the preservative provision in clause "F:" The first lien is valid under the bankrupt law, and is valid as against the general creditors of the debtor, but there being no *lis pendens* recorded, it is void as to the lien of the second creditor. The lien of the second creditor, having his *lis pendens*, is anterior under the State laws, to the lien of the first creditor, but is void under the four-months clause of the bankrupt law. Should the court preserve the lien of the second creditor, it preserves the priority of that lien, and thus preserves for the general creditors that much of the assets of the bankrupt which would have gone to the first creditor instituting the suit, and in the event the property was not more than sufficient to have satisfied his claim, would have taken the entire estate. Thus, a lien otherwise void, is preserved by the court for the benefit of the general creditors.

We call the attention of the court to the quotations on page 6 of the opinion filed, wherein this language is quoted:

"Sub-division *b*, sec. 67 (act of 1898) preserves for the benefit of the estate in bankruptcy, a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy:"

and that in the case at bar, the intervention of the debtor's
47 bankruptcy in no way affected the status of the Roanoke Furnace property, nor did it prevent any particular creditor from enforcing a right. The general creditors of Baird were prevented from acquiring any rights by the recordation of the deed of November 5th, 1900, nearly two months prior to the date the petition was filed against Baird. The court says, on page 5 of its opinion:

"The property which was levied upon by creditors, and by virtue of the attachments, might have been sold under judicial process against the bankrupt."

It is most respectfully submitted that while the bankrupt was a necessary party to the suit, yet the suit was not to sell property which belonged to the bankrupt, and consequently, it could hardly be said that it was sold under judicial process against him, within the meaning of the bankruptcy act. As we construe it, this suit was no more a process against Baird, than it would have been had it been to foreclose an ordinary deed of trust in which he appeared as trustee. His interest in the furnace property was gone: it passed from him more than a year before, and the only defense which he could have made in the suit, had he entered an appearance, would have been to question the correctness of the debt.

Third ground. Upon the question of "what constitutes a preference," as that term is used in the bankruptcy act, the opinion of this court is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit. This court in its opinion at page 5, says:

"A primary object of the bankrupt law is to prevent preferences, and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality, and prevents preferences."

48 That the property attached in the case at bar was not estate of the bankrupt, which could pass to his trustee, is not questioned. The attachment, if enforced, will not be paid out of the estate of the bankrupt, or out of a fund produced by a sale of his estate. A preference, if petitioner's attachment was not sequestered, but was left to it, would not be created unless this court construed the word "preference," as used in the act, to mean equal percentage of payment to each creditor, regardless of the source from which the fund might be derived, with which such payment might be made. Such a construction of a preference is in direct conflict with the construction given by the circuit court of appeals of the eighth circuit, in the case of Swartz *vs.* Fourth National Bank, 117 Federal Rep., page 1. In that case, at page 7, the court said:

"The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect upon the *equal distribution of the estate of the bankrupt,* not its effect up- the creditor, that determines the preference." * * *

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others,* the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. *It is the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt,* and these

alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

The payment of petitioner's attachment to it can work no
49 & 50 diminution of the bankrupt's estate. The property upon which the attachments were levied was sold by Baird on December 7th, 1899,—more than a year prior to the filing of the petition in bankruptcy against him, and he received all the consideration to which he was entitled.

In the case *In re* New York Economical Printing Co., hereinbefore referred to and cited by this court, it was held that the trustee stood in the shoes, so to speak, of the bankrupt, and that a mortgagee who had failed to comply with the registry laws of the State of New York, had a valid prior lien upon the mortgaged property *quoad* the trustee; then how can it be possibly questioned, under this authority, but that a purchaser for value, who for a time only, fails to comply with the registry laws of Virginia, has a right of property superior to the trustee? We submit that under this authority, the Roanoke Furnace property, even though no deed had ever been recorded, would not have passed to Baird's trustee. Then, certainly, with a deed admittedly valid and properly recorded, by no possibility could anything pass to the trustee.

Your petitioner most respectfully urges that it be given a rehearing, and that, thereupon such decree may be entered as will give to your petitioner the sole benefit of its attachment lien.

Respectfully,

FIRST NATIONAL BANK OF BALTIMORE,
By S. HAMILTON GRAVES, Counsel.

I, S. Hamilton Graves, a practising attorney in the United States circuit court of appeals for the fourth circuit, do hereby certify that, in my opinion, a rehearing should be granted as asked for in the foregoing petition, and upon the grounds therein stated, and that a decree should be entered giving to petitioner the benefit of its attachment lien.

Given under my hand this 5th day of December, A. D. 1904.

S. HAMILTON GRAVES.

51 Same day, to-wit: Dec. 9, 1904, mandate is stayed pending petition for a rehearing.

Order Denying a Rehearing.

Filed Feb. 7, 1905.

United States Circuit Court of Appeals, Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupts, *et al.*, Respondents. } No. 532.

On Petition for Review, &c., of the District Court of the United States for the Western District of Virginia.

This court, having at its November term, 1904, rendered its decision affirming the judgment of the district court in this cause, and the petitioner, by its attorney, having on December 9, 1904, presented to the court a petition for a rehearing of the cause.

It is now here ordered, by this court, that the rehearing asked for be, and the same is hereby denied.

NATHAN GOFF,
Circuit Judge, Presiding.

Feb. 7th, 1905.

Feb. 21, 1905, (February term, 1905), mandate stayed 30 days to allow petitioner to file its application in the supreme court for a writ of certiorari.

52 Clerk's Certificate.

UNITED STATES OF AMERICA, Fourth Circuit, } *ss.*:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said circuit court of appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals, fourth circuit, this 10th day of March, A. D., 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

53 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return to the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 12th day of April 1905, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken, as a return to said writ, dated the 14th day of April A. D. 1905.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals on this 17th day of April A. D. 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeal-
for the Fourth Circuit.

54 United States Circuit Court of Appeals for the Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
vs.
WM. H. STAAKE, Trustee of C. R. Baird, Trading as C. R. Baird & Co., Respondent. } No. 532.

It is hereby stipulated that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the 14th day of April A. D. 1905.

S. HAMILTON GRAVES,
Counsel for First National Bank of Baltimore.
S. & M. GRIFFIN,
Of Counsel for W. H. Staake, Trustee.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit do certify that the above stipulation of counsel is a true copy of the original filed April 17, 1905, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the circuit court of appeals, at Richmond, on this 17th day of April, A. D. 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Ct.

55 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

Being informed that there is now pending before you a suit in which First National Bank of Baltimore is petitioner and William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, is respondent, No. 532, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
56 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of April, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

57 [Endorsed:] File No. 19,683. Supreme Court of the United States. No. 583, October term, 1904 First National Bank of Baltimore *vs.* Wm. H. Staake, trustee &c. Writ of certiorari. The execution of the within writ appears from certain schedules thereto annexed Henry T. Meloney cl'k U. S. C. C. appeals April 17, 1905

58 [Endorsed:] File No. 19,683. Supreme Court U. S., October term, 1904. Term No. 583. First National Bank of Baltimore *vs.* Wm. H. Staake trustee, &c. Writ of certiorari and return. Filed April 18, 1905.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 214.

HENRY H. McHARG AND A. A. PELEGAR, RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY ET AL., PETITIONERS,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 26, 1906.
CERTIORARI AND RETURN FILED APRIL 23, 1906.

(19,054.)

(19,684.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 214.

HENRY K. McHARG AND A. A. PHLEGAR, RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY ET AL., PETITIONERS,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

Judd & Detweiler (Inc.), Printers, Washington, D. C., July 11, 1905.

a Transcript of Record.

United States Circuit Court of Appeals, Fourth Circuit.

RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY, Petitioners, *versus* WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt. } No. 531.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg.

Petition Filed January 21st, 1904.

Clerk's office, U. S. circuit court of appeals, fourth circuit. Henry T. Meloney, clerk, Richmond.

1 In the United States Circuit Court of Appeals, Fourth Circuit.

Petition for Review.

Filed January 21, 1904.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.
and
In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

The petition of your petitioners, The Receivers of the Virginia Iron Coal & Coke Company, a corporation; Huff, Andrew & Moyler Company, a corporation; A. M. Nelson and H. H. Myers, partners trading as Nelson & Myers; Roy B. Smith and A. E. King, partners trading as Smith & King; R. R. Fairfax and E. Lee Bell, partners trading as Fairfax & Bell; Central Manufacturing Company, a corporation; and The Standard Oil Company, a corporation, respectfully submits that they, and each of them, are aggrieved by that part of a decree which was entered on January 14th, 1904, in the above styled proceedings by the district court of the United States for the western district of Virginia, sitting as a court of bankruptcy, whereby it was adjudged, ordered and decreed:

1st. That for reasons stated in a written opinion, the demurrer of the attaching creditors to the petition of Wm. H. Staake, trustee, be, and the same is hereby, overruled.

"2nd. And the attaching creditors having by leave of court filed their answer to said petition, to which the said trustee replies generally, it is further adjudged, ordered and decreed:

"That the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by the attaching creditors, to-wit: The Virginia Iron, Coal & Coke Company; Huff, Andrews and Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt; Fairfax & Bell; Central Manufacturing Company; Standard Oil Company; West End Supply Company, and the First National Bank of Baltimore, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, Wm. H. Staake, trustee of the said estate, be, and he is hereby, subrogated to said rights, and authorized and empowered to enforce the said attachment liens with like force and effect as the said attachment creditors might have done had not the bankruptcy proceedings intervened."

For a proper understanding of the assignments of error you- petitioners will give a brief summary of the facts and pleadings, all of which will more fully appear from a transcript from the record in said cause, which is herewith filed as a part of this petition.

(1.) On the 7th day of December, 1899, Chester R. Baird was the owner of certain properties lying in the city of Roanoke and county of Roanoke, Virginia, among which it is pertinent to mention in this connection only what is known as the West Furnace property.

On the 7th of December, he sold the property aforesaid to the Roanoke Furnace Company, a corporation, which as a part of its purchase price, assumed the payment of the unpaid purchase money agreed to be paid by the said C. R. Baird. While possession was transferred, no deed evidencing this sale was made at the time between the parties, but a contract in writing was executed, which, however, was never recorded in accordance with the laws of the State of Virginia. This contract was therefore void under the laws of the State of Virginia, *quoad* any creditors of C. R. Baird who might choose to avail themselves of the statute and sue out attachments against the property.

(2.) Between October 1st, 1900, and November 1st, 1900, several attachments against the said C. R. Baird, trading as C. R. Baird & Co., were issued from the corporation court of the city of Roanoke, levied on the furnace property aforesaid, and memoranda of *lites pendentes* duly recorded. The following is a summary of such attaching creditors, the dates of the respective levies of their attachments and the amounts of the debts therein claimed, exclusive of interest:

3 (Name of creditor.)	Date of levy.	Am't of debt.
Receivers of Va. Iron, Coal & Coke Co...	Oct. 12, 1900	$24,778.83
Huff, Andrews & Moyler Co.....	Oct. 15, "	934 00
Nelson & Myers.....	Oct. 15, "	600.91
Smith & King.....	Oct. 16,	1,050.00
Castner, Curran & Bullitt.....	Oct. 16, "	843.00
Fairfax & Bell.....	Oct. 16, "	640.00
Central Manufacturing Co.....	Oct. 17, "	773.21
Standard Oil Company..	Oct. 25,	383.14
First National Bank of Baltimore	Oct. 16,	12,000.00

(3.) On November 5th, 1900, the said C. R. Baird executed a deed by which he conveyed to the said Roanoke Furnace Company, a corporation, the property hereinbefore mentioned. This deed was recorded in the proper record offices of Roanoke city on November 7th, 1900, and of Roanoke county on November 8th, 1900.

(4.) On November 24th, 1900, some creditors of Baird filed in the district court of the United States for the eastern district of Pennsylvania a petition to have him adjudged a bankrupt, which was done by the said court on February 18th, 1901, and William H. Staake was appointed trustee of the said bankrupt's estate. In the meantime, on the 26th day of December, 1900, John N. M. Shimer and W. H. Staake were appointed receivers of the bankrupt's estate, and an ancillary suit was instituted in this court on January 2nd, 1901, to aid in accomplishing the purposes of the original suit.

(5.) On December 29th, 1900, some creditors of the Roanoke Furnace Company filed in the district court of the United States for the eastern district of Pennsylvania a petition to have said corporation adjudged a bankrupt, which was done by said court on the 27th day of March, 1901, and on the 27th day of June, 1901, John N. M. Shimer was appointed trustee of the estate of the said bankrupt. In the meantime, the said William H. Staake and John N. M. Shimer were appointed receivers of the bankrupt's estate, and an ancillary suit was instituted in this court on the 2nd day of December, 1901, to aid the said court of original jurisdiction in the administration of the assets of the said bankrupt.

(6.) In the ancillary proceedings aforesaid, injunctions were issued restraining the attaching creditors from proceedings to molest or disturb the said property, or interfering with the custody of said receivers and trustees, decrees were entered in the said cause in the district court of Pennsylvania, allowing the said trustee of C. R. Baird to apply for subrogation to the rights of such attaching creditors.

4 (7.) Decrees were also entered in the two causes aforesaid, directing the sale of the properties of the bankrupts, including the property hereinbefore mentioned, and in pursuance of said decree, and in pursuance of certain agreements hereinafter mentioned, the said properties were sold, and from the proceeds of the sale of the said furnace property was deposited a sum of money suffi-

cient to meet the claims of such attaching creditors, should the validity of such claims be established. Before said decree of sale was entered the parties entered into two agreements as to the jurisdiction of the court and as to the facts, which will be found set forth at large in the transcript of the record herewith filed.

(See agreement No. 1, Record page 21.)

(See agreement No. 2, Record page 23.)

(8.) Thereupon, the said William H. Staake, trustee for C. R. Baird & Co., bankrupt, filed in the bankrupt court aforesaid, his petition, in which he set up the agreed facts set forth in said agreements and claimed that he was entitled under the provisions of the bankrupt law, to be subrogated to the rights of the attaching creditors, and was entitled to have said attachment liens enforced for his benefit, and the proceeds of the efforcement of such liens paid over to him as trustee of the estate of the said C. R. Baird, for distribution according to the bankrupt laws.

The ground upon which the said petitioner claimed that he was entitled to be subrogated to the rights of the attaching creditors aforesaid, was that inasmuch as the deed from C. R. Baird & Co. to the Roanoke Furnace Company was unrecorded at the dates of the issuance of the attachments aforesaid, the property thereby conveyed remained the property of the said C. R. Baird, *quoad* the said attachment creditors; and that the said attachments having been sued out within four months of the adjudication of bankruptcy of the said C. R. Baird & Co., they were null and void under the bankrupt law, unless preserved by the court for the benefit of the said petitioner, William H. Staake, trustee; and hence, that he was entitled to have the said liens preserved and to be subrogated to the rights of the attaching creditors therein.

To this petition, the attaching creditors filed their demurrer, in which the petitioner joined, and on the issue there made the court overruled the demurrer. Thereupon, the attaching creditors answered the said petition, relying upon the agreed facts and denying the invalidity of the said attachments and the right of the said petitioner to be subrogated to the rights of the attaching creditors therein.

Upon the hearing of the case on the said petition, answer and agreed facts, the district court aforesaid entered a decree from which the extract above recited is taken.

(9.) Your petitioners pray the jurisdiction of this court under the provisions of an act of Congress approved July 1st, 1898, and amended and re enacted by an act approved February 5th, 1903, entitled "An act to establish a uniform system of bankruptcy throughout the United States," whereby it is given jurisdiction (see sec. 24B) to superintend and revise in matters of law, the proceedings of the several inferior courts of bankruptcy within its jurisdiction.

Assignment of Errors.

(10.) Your petitioners respectfully represent that said district court erred in matters of law when it entered the portion of the decree hereinbefore set forth and assign the following as the errors committed by the court in entering said decree:

1st. That the court erred in overruling the demurrer of the attaching creditors to the petition of William H. Staake, trustee as aforesaid.

The agreed facts which appeared on the face of the petition show that at the time of the suing out of said attachments the property levied on by said attachments, so far as the creditors represented by William H. Staake, trustee, were concerned, was not the property of C. R. Baird & Co., but the property of the Roanoke Furnace Company. Said attachments became liens on said property by virtue of the registry laws of the State of Virginia, and not by virtue of the fact that the said property was that of C. R. Baird & Co.; and the said petition did not disclose that the creditors represented by William H. Staake, trustee, at the date of the filing of the petition in bankruptcy had any claim to or interest in said property. All that they were entitled to was to have the property then owned by C. R. Baird & Co., subjected to the payment of their debts, and it was error to hold that under these circumstances the provisions of the bankrupt law applied.

2nd. The court erred in holding, as is provided in the second clause of the decree hereinbefore mentioned, that the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke, by the attaching creditors aforesaid, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that
6 said petitioner, William H. Staake, the trustee of said estate, be and he is hereby subrogated to said rights and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done had not the said bankruptcy proceedings intervened.

Inasmuch as the facts were agreed upon by the parties and the petition and answer set up no new facts, the ruling of the court upon the petition, answer and agreed facts was practically the same as the ruling upon the demurrer, and is erroneous for the same reasons as those assigned in regard to the ruling as to said demurrer.

The said C. R. Baird & Co., having on the 6th day of November, 1900, placed of record a deed conveying the said furnace property to the Roanoke Furnace Company, and the same having been done prior to the filing of the petition in bankruptcy, at the date of the filing of the petition in bankruptcy, the said C. R. Baird & Co. had no interest whatsoever in the said property; the creditors of C. R. Baird & Co. who had not theretofore availed themselves of the attachment laws of the State of Virginia had no interest therein, and no longer any right to sue out attachments against said property,

nor subject the same to the payment of their debts, and there passed to the trustee of C. R. Baird and his creditors, no interest or right in the said property and no ground, equitable or legal, on which he could assert the right to be subrogated to the rights of the attaching creditors of C. R. Baird & Co. None of the provisions of the bankrupt law apply to a case of this kind. The bankrupt law had no application to this case, because that only applies to the distribution of the assets of the bankrupt, and has for its object the prevention of a preference in favor of any of the creditors who have a right to subject the assets of the said bankrupt, and there was no preference as to such assets in this case, because the property reached by the attachments was in no sense a part of the assets of the bankrupt.

It is therefore submitted that the court erred in both of its findings hereinbefore mentioned, for the reasons hereinbefore stated and such other reasons as will be hereafter advanced upon the argument of this cause.

In tender consideration whereof, your petitioners pray this honorable court to superintend and revise in all matters of law, said proceedings and findings of said district court, and that it reverse and annul that portion of the decree of January 14th, 1904, hereinbefore set forth, by which your petitioners are aggrieved, and that it enter or cause to be entered such decree or decrees as will
7 secure to your petitioners the rights which they are clearly entitled to under the law.

And your petitioners will, as in duty bound, aver, pray, &c.

RECEIVERS OF THE VIRGINIA IRON, COAL & COKE COMPANY,
By W. G. & E. W. ROBERTSON,
Their Attorneys.
THE HUFF, ANDREWS & MOYLER COMPANY,
NELSON & MYERS,
SMITH & KING,
FAIRFAX & BELL,
CENTRAL MANUFACTURING COMPANY,
THE STANDARD OIL COMPANY,
By SCOTT & STAPLES, Their Attorneys.

WM. GORDON ROBERTSON,
EDWARD W. ROBERTSON,
SCOTT & STAPLES,
Solicitors for the Petitioners.

Memorandum.

A certified copy of the above petition, with notice to respondent's attorney to answer, demur or move to dismiss said petition within

fifteen days, was mailed to S. Griffin, Esq., January 21, 1904, as required by rule 36, bankruptcy.

HENRY T. MELONEY, Clerk.

Demurrer to Petition.

Filed Feb. 8, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.

and

In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

The demurrer of William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, bankrupt, to the petition of
8 the Receivers of the Virginia Iron, Coal and Coke Company *et als.*, filed on the 21st day of January, 1904.

This defendant by protestation, not confessing or acknowledging any or all of the matters and things in the said petition contained, to be true in such manner and form as the same are therein set forth and alleged, doth *doth* demur to the said petition; and for causes to demur- showeth:

That said petition is not sufficient in law; it appearing by the plaintiffs' own showing by the said petition that they are not entitled to the relief prayed for by the petition against this defendant; wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said petition, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

S. GRIFFIN,

Solicitor and of Counsel for the Defendant, William H. Staake, Tr. of C. R. Baird, Trading as C. R. Baird & Company.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

S. GRIFFIN,

Of Counsel for Defendant, Wm. H. Staake, Tr. of C. R. Baird, Trading as C. R. Baird & Company.

The affidavit that the above demurrer is not interposed for delay is hereby waived.

WM. GORDON ROBERTSON,

Of Counsel for Petitioners.

Answer.

Filed Feb. 8, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.
and
In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

The answer of William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, to the petition of the receivers of
9 the Virginia Iron, Coal and Coke Company *et als.*, respectfully shows to this court:

1. That this respondent has lately exhibited and filed in the district court of the United States for the western district of Virginia, his petition against the said Virginia Iron, Coal and Coke Company *et als.*, upon which petition and the proceedings thereunder the decree complained of in the petition for revision was had.

Respondent further says that all and singular the allegations in said petition of respondent as therein made are true, and that respondent refers to the same, and makes the same and the allegations thereof a part of this answer, the same as if fully set out and incorporated herein.

2. Respondent further says, that the facts of this case are all matters of record, and that so far as said petition sets out the facts as contained in the record, he admits them to be true, but so far as there is any variance, respondent denies that the facts set out in said petition for revision are true.

And now having fully answered, he prays to be hence dismissed.

WM. H. STAAKE,
Trustee of C. R. Baird, Trading as C. R. Baird & Co.
By COUNSEL.

S. AND U. GRIFFIN, p. d.

Transcript of Record.

Filed Feb. 22, 1904.

UNITED STATES OF AMERICA, Western District of Virginia, } *To wit:*

Pleas in the district court of the United States for the western district of Virginia, before the Honorable Henry C. McDowell, judge of the district court of the United States for the western district of Virginia, on Thursday, the 14th day of January, anno Domini 1904, and in the 128th year of the Independence of the United States.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt.

In re ROANOKE FURNACE COMPANY, Bankrupt.

In Bankruptcy.

Be it remembered, that heretofore, to wit, on the 27th day of February, 1903, in the clerk's office of the said district court of
10 the United States for the western district of Virginia, at Lynchburg, came Wm. H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, by counsel, and filed his petition, which petition is in the words and figures following, to-wit:

Petition of William H. Staake, Trustee.

Filed Feb'y 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Company, Bankrupt. In Bankruptcy.

In the Matter of ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

To the Honorable Henry Clay McDowell, judge of the said court:

The petition of William H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, respectfully represents:

1. That your petitioner is the trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, having been appointed and qualified as such in proceedings pending in the dis-

trict court of the United States for the eastern district of Pennsylvania, whereof this honorable court has assumed ancillary jurisdiction.

2. That your petitioner has filed against the estate of Roanoke Furnace Company, in proceedings likewise pending in the district court of the United States for the eastern district of Pennsylvania, whereof this honorable court has likewise assumed ancillary jurisdiction, his claim in the sum of $158,757.55. This amount includes $85,000 due by Chester R. Baird to Robert E. Tod in part payment for the Roanoke or West End Furnace property; the Roanoke Furnace Company assumed payment of this as part of the consideration of the conveyance to it by Chester R. Baird of the said premises, but failed to carry out its agreement, and Baird was obliged to pay the same to Tod.

3. That the said premises were attached by sundry creditors of said Baird, as and for his property, by reason of the non-recorda-
11 tion of the deed from said Baird to the Roanoke Furnace Company. The facts respecting the conveyance of the said premises, the said attachments, the insolvency of Baird and of Roanoke Furnace Company, and the like, are set forth at length in the agreed statements of fact heretofore attached, respectively marked Exhibits A and B, and made part hereof.

4. That your petitioner, by decree of the district court of the United States for the eastern district of Pennsylvania, was ordered to have himself subrogated to the rights of the aforesaid attaching creditors, said decree being as follows:

"And now, to-wit, this 3rd day of May, A. D. 1901, upon consideration of the foregoing petition and on motion of John Dickey, Jr., Hazard Dickson and Samuel W. Cooper, Esqs., attorneys for William H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, it is ordered, adjudged and decreed that William H. Staake, trustee as aforesaid, be and he hereby is authorized and directed to proceed in an appropriated manner to have himself subrogated to the rights of the holders of the liens of attaching creditors of Chester R. Baird, trading as C. R. Baird & Company, who have levied by foreign attachment and otherwise upon the premises contracted to be conveyed to the said Baird by Robert E. Tod, and empowered, when thus subrogated, to enforce the same in his name as trustee with like force and effect as the holders of the said liens might have done had not bankruptcy proceedings intervened; but the said liens shall in that event be subordinated to the receiver's certificates authorized by the order of this court on the 30th day of March, 1901, as amended by the further order made on the 19th day of April, 1901, *In re* Roanoke Furnace Company, bankrupt."

The receiver's certificates mentioned in said decree have now all been discharged.

Your petitioner therefore shows that under the laws of Virginia, the rights of the aforesaid attaching creditors are superior to those

of Roanoke Furnace Company, bankrupt, and that *quoad* them the property attached is the property of Chester R. Baird, now bankrupt; but that by reason of the insolvency of Chester R. Baird at the time of the levying of the said attachments, these attachments (having been levied within four months of the filing of the petition praying that he be adjudged a bankrupt) are to be deemed null and void under the provisions of the bankruptcy act of 1898, unless the court shall order that they be preserved for the benefit of his estate.

12 Your petitioner further shows that it would be to the benefit of the estate whereof he is trustee thus to preserve the said attachments as already directed by the district court of the United States for the eastern district of Pennsylvania, the court of primary jurisdiction.

Your petitioner therefore prays that your honorable court will assume jurisdiction of the matter, and that the attachments aforesaid be decreed null and void as regards the present plaintiffs, but that they be preserved for the benefit of your petitioner.

Your petitioner further prays that if this honorable court declines to assume jurisdiction and remits the matter to the courts out of which the said attachments issued, this honorable court will nevertheless order these attachments preserved for the benefit of the estate whereof your petitioner is trustee, and direct your petitioner to proceed to have himself subrogated to the rights of the holders of the said attachments, and empower him to perfect and enforce the same in his name as trustee.

And your petitioner will ever pray.

WILLIAM H. STAAKE,
Trustee Chester R. Baird, Trading as
C. R. Baird & Co., Bankrupt.

UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *ss:*

William H. Staake, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing petition are just and true, as he verily believes.

WILLIAM H. STAAKE.

Sworn and subscribed before me this 25th day of February, A. D. 1903.

WM. A. RAFFERTY,
[SEAL OF NOTARY PUBLIC.] Notary Public.

Commission expires January 26th, 1907.

Amendment to Petition.

To the Honorable Henry Clay McDowell, judge of the circuit court of the United States for the western district of Virginia:

The petition of Wm. H. Staake, trustee of the estate of Chester R. Baird, trading as "C. R. Baird & Company," bankrupt, respectfully represents:

1. That your petitioner desires to add to his petition, which
13 was verified on the 25th day of February, 1903, the following averment, which was omitted therefrom though inadvertence, to-wit:

(3–*a*.) That the attachments aforesaid covered likewise certain other premises, being a portion of the premises conveyed to Chester R. Baird by Rob't E. Tod; this portion of the premises the said Baird, by written contract dated the 7th day of December, 1899, covenanted and agreed to convey to the Virginia Rolling Mill Company, but the said contract remained executory, possession of the premises was not delivered, nor was a deed executed or delivered, and the said contract was, by mutual agreement, abrogated and rescinded on the — day of August, A. D., 1902.

And your petitioner will ever pray, etc.

WM. H. STAAKE, Trustee,
By HAZARD DICKSON.

UNITED STATES OF AMERICA,
Western District of Virginia, } *To-wit:*

Hazard Dickson, being duly sworn according to law, doth depose and say that he is attorney for Wm. H. Staake, petitioner herein, who is not now within the western district of Virginia; that this deponent is fully informed as to the foregoing facts, and the same are just and true, as he verily believes.

Given under my hand this 26th day of February, 1903.

HAZARD DICKSON.

Subscribed and sworn to before me this 26th day of February, A. D., 1903.

G. A. WINGFIELD,
Commissioner in Chancery.

EXHIBIT "A."

(Agreement No. 1.)

Whereas certain attachments issuing out of suits pending in the hustings court of the city of Roanoke, Virginia, have been levied upon certain property as and for the property of C. R. Baird and others, which property John N. M. Shimer, trustee of the estate of the Roanoke Furnace Company, bankrupt, and William H. Staake, trustee of the said Chester R. Baird, trading as C. R. Baird & Co.,

bankrupt, are about to sell under an order of the district court of the United States for the eastern district of Pennsylvania; and

Whereas it is claimed by the said trustees that jurisdiction of the claims of the said attaching creditors is in the Federal courts, and not in the courts of Virginia, and this question being undetermined, the said trustees are willing that a fund sufficient to meet
14 these claims shall be deposited in the Philadelphia national bank, or in the Fidelity Trust Company of Philadelphia, payable upon the order of the court, which shall maintain its jurisdiction over said claims, and distribute the fund to the parties entitled thereto;

Now, therefore, it is hereby agreed by and between the said trustees and the said attaching creditors, that the said trustees will apply at once — the judge of the said district court of the United States in and for the eastern district of Pennsylvania for an order permitting and directing them to deposit a fund sufficient to pay said attachment claims, and that said fund shall be payable and distributed upon the order of the said courts of the State of Virginia, should the said courts exercise jurisdiction, and make order of distribution as aforesaid, and upon the order of the Federal court, if the said court shall exercise jurisdiction in the matter and make order of distribution as aforesaid, certificate of deposit shall be given by the depositary payable as aforesaid, and copies of the same be deposited in the State and Federal courts aforesaid;

And the said attaching creditors hereby further agree that in consideration of the foregoing, provided said order is entered, they will make no objection to the confirmation of the sale aforesaid, for a price sufficient to admit of a deposit of the sum aforesaid.

Nothing in this agreement shall operate to prejudice the right of the attachment creditors to insist that the trustee of the estate of C. R. Baird & Co., is not entitled to the benefit of said attachments, and that the corporation court of the city of Roanoke, Virginia, has jurisdiction to determine such question; the object being that such questions are to be determined by the court of proper jurisdiction, unaffected by this agreement.

Witness the following signatures the day and year first above written.

WILLIAM H. STAAKE,
Trustee C. R. Baird & Co.
JOHN N. M. SHIMER,
Trustee Roanoke Furnace Co.
WATTS, ROBERTSON & ROBERTSON,
For Receivers Virginia Iron, Coal & Coke Co.
SCOTT & STAPLES,
Attorneys for Huff, Andrews & Moyler Co.,
Smith & King, Nelson & Myers, Central Mfg. Co.
A. B. COLEMAN,
Attorney for the Standard Oil Co., Fairfax & Bell.

July 31, 1902.

15 EXHIBIT "B."

(Agreement No. 2.)

In the Matters of C. R. BAIRD & Co., Bankrupt,
and
THE ROANOKE FURNACE COMPANY, Bankrupt.

The following is agreed between the undersigned, the trustees of the estate of C. R. Baird, trading as C. R. Baird & Co., bankrupt, and the Roanoke Furnace Co., bankrupt, and certain attachment creditors whose names are mentioned in the schedule hereto attached, marked "Exhibit No. 1."

(1.) The question of what court, State or Federal, has prior jurisdiction to determine who is entitled to the benefit of said attachment liens, and what court shall enforce them, is submitted to the district court of the United States for the western district of Virginia, in the ancillary proceedings in the matter of C. R. Baird & Co., bankrupt, and the Roanoke Furnace Company, bankrupt. Should the Federal court, which shall determine such question, establish its own prior jurisdiction, then the question of who is entitled to the benefit of such attachment liens is to be decided by it on the facts herein agreed, and if it shall establish the prior jurisdiction of such State court, then the latter court shall determine who is entitled to the benefit of such attachments, upon said facts agreed; but this agreement shall not prejudice the rights of any party hereto to take any appeal from the decision of any court on any issue raised, jurisdictional or otherwise, which he would have the right to take if this agreement had not been made.

Agreed Facts.

(1.) That a petition praying that Chester R. Baird, trading as C. R. Baird & Company, be adjudged an involuntary bankrupt was filed in the district court of the United States for the eastern district of Pennsylvania, on the 24th day of December, A. D. 1900, and a further petition was filed in said court on the 26th day of December, A. D., 1900, in accordance with the prayer of which John N. M. Shimer and William H. Staake were appointed receivers of the estate of the said Chester R. Baird, trading as C. R. Baird & Co., and such receivers duly qualified and entered upon the duties of their office.

(2.) That a petition was filed in the district court of the
16 United States for the western district of Virginia, on the 2nd day of January, 1901, praying among other things that said court assume ancillary jurisdiction of the cause and appoint receivers of the estate of the said alleged bankrupt, found within the territorial jurisdiction of this court, and in pursuance thereof the

said John N. M. Shimer and William H. Staake were appointed receivers of said estate, who thereupon qualified and entered upon the duties of their office, and assumed possession of said estate.

(3.) That Chester R. Baird, trading as C. R. Baird & Co., was on February 18th, 1901, by the district court of the United States for the eastern district of Pennsylvania duly adjudged a bankrupt and on the 29th day of March, 1901, William H. Staake was appointed trustee of the -tate. He qualified and entered upon the duties of his office and took possession of the estate of the bankrupt, as set out in the inventory and appraisement filed in the record in said cause.

(4.) That said Chester R. Baird by written contract made and entered into the 7th day of December, 1899, but was not recorded, sold to the Roanoke Furnace Company a certain furnace property lying partly in the city of Roanoke and partly in the county of Roanoke, Virginia, commonly known as the "West End Furnace" and other property, and by deed of conveyance dated the 5th day of November, 1900, and recorded in the clerk's office of the corporation court of the city of Roanoke, on the 7th day of November, 1900, in Deed Book 125, page 149, and in the clerk's office of the county court for Roanoke county on the 8th day of November, 1900, in Deed Book 22, page 402, conveyed the said land or the West End Furnace property, to the said Roanoke Furnace Company for the consideration therein named, copies of which deed and contract are hereto attached, marked "Exhibit No. 2." That certain other conveyances were made by the said C. R. Baird to the said Roanoke Furnace Company, a statement, or copies of which, are filed herewith, marked "Exhibit No. 3."

(5.) That a petition praying that the Roanoke Furnace Company be adjudged an involuntary bankrupt was filed in the district court of the United States for the eastern district of Pennsylvania, on December 29th, 1900, and the said court in said proceedings, in accordance with the prayer of a petition filed therein, appointed William H. Staake and John N. M. Shimer receivers of the estate of the said Roanoke Furnace Company, who duly qualified as such and entered upon the duties of their office.

17 (6.) That a petition was filed in the district court of the United States for the western district of Virginia, on the 2nd day of January, 1901, praying, among other things, that the court assume ancillary jurisdiction of the matter of the Roanoke Furnace Company, alleged bankrupt, and appoint receivers of the estate of the said alleged bankrupt found within the territorial jurisdiction of this court; and in pursuance thereof the said William H. Staake and John N. M. Shimer were appointed receivers of the said estate, and qualified as such and entered upon the duties of their office, and assumed possession of the said estate.

(7.) That pursuant to the prayer of the petition filed the said 29th day of December, 1900, the said Roanoke Furnace Company was adjudged a bankrupt on the 27th day of March, A. D., 1901, and subsequently, to-wit: on the 27th of June, 1901 the said John N. M.

Shimer was appointed trustee of its estate. The said John N. M. Sheimer has duly qualified as such, and entered upon the duties of his office; and is now in full custody and possession of the estate of the said bankrupt found within the territorial jurisdiction of the district court of the United States for the western district of Virginia.

(8.) That within the period of four months next before the 24th day of December, 1900, sundry attachments were levied upon the estate of the said Chester R. Baird trading as C. R. Baird & Co., whereof a schedule is hereto attached, showing the name of the attaching creditor, the amount of the debt for which such attachments were issued and levied, the dates of such levies, and the property on which they were levied; which schedule is made a part of this agreement, and is marked "Exhibit No. 4." No bond was given by any attaching creditor.

(9.) That inasmuch as the contract and deeds from C. R. Baird & Co. to the Roanoke Furnace Company had not been recorded at the time of the levying of such attachments, the property therein conveyed is to be deemed and taken under the laws of the State of Virginia as the property of the said C. R. Baird, *quoad* the said attachment creditors of the said C. R. Baird & Co., in the said schedule mentioned, and *quoad* the liens and debts therein referred to, and no further, and that said attachments were valid liens on the property levied on as of the dates of said levies respectively, subject to corrections, if any, as to the amounts of said debts.

18 (10.) That the said Baird, trading as aforesaid, was insolvent at the time of the suing out and levying of the said attachments. That *lites pendentes* were filed against the property of C. R. Baird, trading as C. R. Baird & Co., in the attachment proceedings aforesaid, and at the dates and on the property mentioned in the schedule hereunto attached, marked "Exhibit No. 5," as provided by the Virginia statute.

(11.) That any part of the records in the proceedings of the matter of the Roanoke Furnace Co., bankrupt, and C. R. Baird, bankrupt, or in the attachment or proceedings aforesaid, may be considered by the court, State or Federal, which may pass upon any issues herein referred to, but this agreement shall not operate to waive any question of jurisdiction involved in any of the cases aforesaid. Any objection to the certificates of copies of papers on file is waived.

Roanoke, July 31, 1902.

SCOTT & STAPLES,
Att'ys for Nelson & Myers, Central Mfg. Co., Huff, Andrews & Moyler Co., Smith & King.

A. B. COLEMAN,
Att'ys for the Standard Oil Co., Fairfax & Bell.

WILLIAM H. STAAKE,
Trustee C. R. Baird & Co., Bankrupt.

J. N. M. SHIMER,
Trustee for Roanoke Furnace Co., Bankrupt.

WATTS, ROBERTSON & ROBERTSON,
For Rec'v'rs Va. I. C. & C. Co., Castner, Curran & Bullitt.

EXHIBIT No. 1. Filed with Petition.

Virginia Iron, Coal & Coke Company,
Nelson & Myers,
Huff, Andrews & Moyler Company,
Central Manufacturing Company,
Smith & King,
Standard Oil Company,
Fairfax & Bell,
Castner, Curran & Bullitt.

19 Answer of Attachment Creditors to Petition of William H. Staake, Trustee.

In the District Court of the United States for the Western District of Virginia.

Filed November 27, 1903.

In the Matter of C. R. BAIRD, Trading as C. R. Baird & Co. (Bankrupt).

In the Matter of ROANOKE FURNACE COMPANY, a Corporation (Bankrupt).

In Bankruptcy.

Answer of the First National Bank of Baltimore, the Virginia Iron, Coal & Coke Co., a corporation; the Huff, Andrews & Moyler Company, a corporation; A. M. Nelson and H. H. Myers, late partners trading as Nelson & Myers; Roy B. Smith and A. E. King, partners trading as Smith & King; —— Castner, —— Curran, and —— Bullitt, partners trading as Castner, Curran & Bullitt; the Central Manufacturing Company, a corporation; R. R. Fairfax and C. B. Bell, late partners as Fairfax & Bell, and the Standard Oil Company, a corporation, to the petition of William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company.

These respondents, The Virginia Iron, Coal & Coke Company, a corporation; The Huff, Andrews & Moyler Company, a corporation; Nelson & Myers; Smith & King; Castner, Curran & Bullitt; The Central Manufacturing Company, a corporation; Fairfax & Bell; and The Standard Oil Company; not waiving their demurrer to the said petition, but insisting on the same, for answer thereto, or to so much thereof as they are advised it is material they should answer, answering say:

(1.) They rely on the agreed facts evidenced in a-reement No. 1 and agreement No. 2 and the one with the First National Bank of

Baltimore, filed in the record in this cause, and the exhibits therein referred to, and in so far as the allegations of the said petition are in accordance with said agreements and exhibits, they admit them to be true, and in so far as they are in conflict with said agreed facts and agreements and exhibits, or are outside thereof, they deny that they are true, and call for proof of such allegations.

(2.) They deny that the said William H. Staake, trustee, is
20 entitled to be subrogated to the rights of said respondents, or that he or the general creditors of C. R. Baird have any interest therein, or any rights in the premises, or that the property of C. R. Baird conveyed by him to the Roanoke Furnace Company, under the deed mentioned in said agreed facts, prior to the bankruptcy of the said C. R. Baird and levied on in the said attachment proceedings therein mentioned, come within the operation of the bankrupt law, or is in any way affected thereby, and the same is true of the fund substituted in the place of the said property.

(3.) They waive any question of the prior jurisdiction of the hustings court of the city of Roanoke to adjudicate the question and issues herein involved, and consent that the same may be adjudicated by this court; but always with the reservation that the merits of the said issues are not to be affected, or respondents' property rights impaired by this waiver.

And now having fully answered they pray this honorable court may hold that the said trustee and creditors have no rights to, or interest in, said attachments, or the property so attached, or the fund derived thereby; but that the said fund may be paid to these respondents, according to the amounts due to them respectively.

And they will ever pray, etc.

THE VIRGINIA IRON, COAL & COKE COMPANY,
THE HUFF, ANDREWS & MOYLER COMPANY,
NELSON & MYERS,
SMITH & KING,
CASTNER, CURRAN & BULLITT,
CENTRAL MANUFACTURING COMPANY,
FAIRFAX & BELL,
THE STANDARD OIL COMPANY, AND
THE FIRST NATIONAL BANK OF BALTIMORE,
By COUNSEL.

Affidavit waived by consent of counsel.

HENRY C. McDOWELL,
District Judge.

21 Opinion of the Court.

Filed Jan'y 14th, 1904.

United States District Court, Western District of Virginia.

In re C. R. BAIRD, Bankrupt,
and
In re ROANOKE FURNACE COMPANY, Bankrupt.

C. R. Baird, who did business under the name of C. R. Baird & Co., was the owner of certain real estate situated in this district, consisting of (1) the West End Furnace property; (2) certain mines, houses, rights of way &c., and (3) a rolling mill.

On December 7th, 1899, Baird, by written contract, sold the furnace property to the Roanoke Furnace Company, in consideration of the issue to Baird of certain shares of the vendee's capital stock and the assumption by the vendee of a purchase money debt owing on the furnace by Baird to R. E. Tod. This contract was never recorded. On November 5, 1900, Baird executed and delivered to the Roanoke Furnace Company a deed in pursuance of the above mentioned contract, conveying the furnace property, which deed was forthwith recorded.

On October 13, 1900, Baird conveyed to the Roanoke Furnace Company the mines, houses, &c., but these deeds were not recorded up to the time that the petition in bankruptcy against Baird, hereafter to be mentioned, was filed.

The title to the rolling mill remained in Baird.

Between October 12th and 31st, 1900, at which time Baird was insolvent, some of Baird's creditors sued out from the corporation court of the city of Roanoke, Virginia, attachments which were levied on all three of the above mentioned properties.

On December 24, 1900, other of Baird's creditors filed in the district court for the eastern district of Pennsylvania a petition in bankruptcy against him. In due course that court adjudicated Baird a bankrupt. Early in the course of this proceeding, ancillary jurisdiction was taken of the cause by this court.

On December 29, 1900, an involuntary petition against the Roanoke Furnace Company was filed in the said Pennsylvania court, followed by an adjudication. Ancillary jurisdiction of this cause was also taken by this court.

All of the above mentioned properties have been sold by order of court and the proceeds are deposited to the joint credit of
22 Staake, trustee of Baird's estate, and Shimer trustee of the furnace company estate, to await the determination of the questions hereinafter discussed.

By the registry statutes of this State unrecorded contracts of sale

and conveyances of real estate are void as to, at least, lien creditors.

The questions here are presented by a petition filed by Staake, trustee, praying that the attachments above mentioned be declared void as regards the creditors who sued them out, but preserved for the benefit of Baird's estate; by a demurrer to this petition filed by the attaching creditors; by an answer to the petition filed by Shimer, trustee of the furnace company estate, praying that if the benefit of the attachments be given to the trustee of Baird's estate he be required to correspond-ly abate his claim against the furnace company estate; and by a supplemental answer by Shimer, trustee.

At the hearing all objections to the jurisdiction of this court were withdrawn, and jurisdiction is taken by express consent of all parties.

The demurrer to the petition is intended to raise merely the question as to whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

By 67*f* of the bankrupt law, all attachments obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt; and the property affected by the attachment shall be deemed wholly discharged and released from the same, and shall pass to the trustee as part of the estate of the bankrupt, unless the court shall on due notice order that the right under such attachment shall be preserved for the benefit of the estate. In the case at bar the attachments were obtained through legal proceedings against Baird, within four months of the filing of the petition against him, and he was insolvent at the time. The language of this section so exactly fits the case we have here that some cogent reason must be found before we can properly hold that it does not apply.

Counsel for the attaching creditors, in an unusually excellent argument, take the position that the case at bar is not within the intent of the bankrupt law. They argue that it is so unjust and inequitable to take from the attaching creditors the fruits of their diligence and give them to all the creditors pro rata, that Congress could not have intended the act to apply in a case such as we have here. Nevertheless, counsel for these creditors necessarily
23 admit that if Baird had never conveyed the furnace, or if his grantee had never recorded the deed, or if Baird had made a fraudulent conveyance, the act plainly takes from the attaching creditors the fruits of this diligence and gives them all the creditors pro rata. The argument that the law is unjust or inequitable is certainly as strong in any of the three supposed cases as in the case at bar. While the State law gives to diligent creditors who attach a priority of payment, a preference, over those who do not attach, it is beyond dispute that the intent of the bankrupt law (except as to rights gained more than four months before the filing of the petition in bankruptcy) is just the reverse. The intent of the

latter, except as aforesaid, is to prorate all available assets and to prevent any priority of payment being obtained by any creditor within the four months, whether by consent of the debtor or by the diligence of the creditor. Such being the intent of the law, it seems to me that the argument based on the supposed injustice of the act as applied to case at bar is not of weight. Such being the intent of the law, it would be surprising if Congress had omitted to provide for the (not) uncommon state of facts which we have here. And, as above remarked, the language of 67*f* seems entirely adapted to the case we have here, as well as to other possible cases. In cases where the title to the attached property remains in the bankrupt, the liens of attaching creditors are simply annulled and the proceeds of the property are divided pro rata among all the creditors. In cases where the bankrupt has made a fraudulent conveyance, this deed is by proper proceedings set aside, the attachments are annulled and the proceeds of the property are prorated among all the creditors. In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the pro rata benefit of all the creditors.

It is further argued that the case at bar is not within the intent of the act, because the right here contended for by the trustee is not mentioned in section 70*a* of the act. This argument does not seem to me to be of force. Section 70*a* is an enumeration of those properties the title to which passes to the trustee by operation of law. The right here asked for by the trustee can be given him only by order of court. It would have been inconsistent, even absurd, to have provided in 70*a* that the rights of attaching creditors, in a case such as we have here, shall vest in the trustee by operation of law, when it had been provided in 67*f* that such rights should be vested in the trustee by order of court.

24 It was further argued that the power to preserve and enforce liens for the benefit of all the creditors is given only as to liens that may be annulled under 67*f*; that only liens which give a preference are thus to be annulled, and that the liens here do not give a preference. While the argument is ingenious, I cannot assent to its soundness. If the attaching creditors are allowed to have the exclusive benefit of their liens, I do not see why they are not in effect allowed a preference. In such event they will be paid in full, while the other creditors will receive only a small proportion of their claims. Again, 67*f* is not confined to liens that create a preference. Its language expressly embraces all liens obtained as were the liens in the case at bar.

Considerable effort was expended in argument on the proposition that an unrecorded contract of sale, or deed, is made void by the Virginia statutes only as to lien creditors, and that, even if there were doubt about this as a legal proposition, clause 9 of the agreed facts in effect so states. I see no necessity of discussing these questions. If it were admitted that the right contended for by the trus-

tee had to be found in 70*a* before such right could be given him, this point might be of considerable interest. But, as above stated, this right could not properly have been mentioned in 70*a*. The power of the court, and, indeed, its duty, to take away from the attaching creditors the benefit of their liens and give it to the trustee is found specifically in 67*f*. To thus construe this section is in line with the undoubted policy of the act; and its language is so sweeping and general that I am constrained to believe that had Congress not intended such cases as we have here to fall within its purview, some specific provision would have been made excepting such cases.

So far as this branch of the case is concerned, I am of opinion that an order should be made subrogating the trustee to the rights of the attaching creditors in the fund derived from the sale of the furnace property.

By request of counsel for the attaching creditors, and as the questions have not been argued, I do not now express an opinion on the questions presented by the answer and supplemental answer of Shimer, trustee.

Since the foregoing opinion was sent to counsel a petition has been filed by counsel for certain of the attaching creditors, praying that an allowance be made to counsel out of the fund now under the control of the court. Staake, trustee, demurred to the petition.

25 The fund in question would not exist but for the services of counsel. Had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company. Under such circumstances, equity treats the fund as charged with the claims of counsel for a reasonable allowance. I do not find any provision of the bankrupt act which deals with this question, nor any provision which seems to me to debar such an allowance. The fund should, I think, be treated as having come under the control of this court subject to this charge. In making such allowance the court is not distributing the bankrupt's estate; but is directing the payment of a prior lien or charge on the fund, and only the balance left after such payment can properly be treated as the estate of the bankrupt.

Having announced to counsel that I would overrule the demurrer, an answer to the petition has been filed by the trustee.

The authorities cited in the answer do not seem to me to hold that a reasonable allowance would be improper under the circumstances of this case. In support of the reasonableness of the amounts prayed for in the petition, sundry depositions of members of the bar have been taken. On a question of fact the court is bound by the weight of the testimony. But in this case the question of fact is as to what the services of counsel were, and as to this there is no dispute. The question as to what is a reasonable allowance for such services is one on which the opinions of members of the bar can properly have only advisory force. It is the duty of the court to decide what sum is reasonable, and this duty cannot be shifted to

expert witnesses. Out of deference to the opinions of the members of the bar who have testified, I make the allowances somewhat larger than I should have done had the question been submitted without these depositions; but I cannot allow the sums prayed for. It appears that the minimum fee allowed by the rules of the Roanoke Bar Association is 10 % on the first $1,000 and 5 % on the balance. This it is said is the scale for collections made without suit. All things considered, I have concluded that ten per cent. of the first $5,000 and 5 % of the next $5,000 and three per cent. of the balance is as much as is reasonable here. Especially so as I am satisfied that very few of the bar of this State (where fees are not extremely high), would decline to do the work that was done here for these fees.

The chief item of labor in the services of counsel was the
26 title examination necessary to learn what real estate could be attached; but this was done only once, at the most, by each of the counsel. The allowances, therefore, should be computed on the aggregate of the claims represented by each firm or individual.

The order may direct that Messrs. Scott & Staples be paid ten per cent. of the first $5,000 and five per cent. of the balance, if any, of the aggregate of principal and inter- of the claims of Huff, Andrews & Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt, and Central Manufacturing Company.

That A. B. Coleman, Esq., be paid ten per cent. of the aggregate of principal and interest of the claims of Fairfax & Bell and Standard Oil Company.

That S. Hamilton Graves, Esq., be paid ten per cent. of the first $5,000 and five per cent. of the balance of principal and interest of the claim of First National Bank of Baltimore.

That Messrs. Watts, Robertson & Robertson be paid ten per cent. of the first $5,000, five per cent. of the next $5,000 and three per cent. of the balance of the claim of Virginia Iron, Coal & Coke Company.

That Messrs. Cocke & Glasgow be paid ten per cent. of the principal and interest of the claim of the West End Supply Company.

HENRY C. McDOWELL.

And now at this day, to wit: In the district court of the United States for the western district of Virginia, at Lynchburg, held on Thursday, the 14th day of January, 1904.

HENRY C. McDOWELL, Judge.

Decree of Court.

Entered January 14th, 1904.

United States District Court, Western District of Virginia, at Lynchburg.

In re C. R. Baird, Bankrupt,
and
In re Roanoke Furnace Company, Bankrupt.

These causes having been argued by counsel, upon consideration thereof it is adjudged, ordered and decreed as follows:

1st. That for reasons stated in a written opinion, the demurrer of the attaching creditors to the petition of Wm. H. Staake, trustee, be, and the same is hereby, overruled.

27 2nd. And the attaching creditors having by leave of court filed their answer to said petition, to which the said trustee replies generally, it is further adjudged, ordered and decreed:

That the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by the attaching creditors, to-wit: the Virginia Iron, Coal & Coke Company; Huff, Andrews and Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt; Fairfax & Bell; Central Manufacturing Company; Standard Oil Company; West End Supply Company, and the First National Bank of Baltimore, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, Wm. H. Staake, trustee of the said estate, be, and he is hereby, subrogated to said rights, and authorized and empowered to enforce the said attachment liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings intervened.

3rd. Without at this time deciding or considering any other question, it is further adjudged, ordered and decreed that Wm. H. Staake, trustee, and John N. M. Shimer, trustee, are directed to collect the funds heretofore deposited by them under the agreement, known as the agreement No. 1, and to pay over the same to the said Wm. H. Staake, trustee, to be by him held subject to the orders of this court.

4th. And upon the hearing of the petition of counsel for the attaching creditors, and the demurrer of Staake, trustee, thereto, it is ordered that the said demurrer be, and it is hereby, overruled, and the said trustee having answered said petition, upon consideration of the arguments of counsel and for reasons set forth in a written opinion, it is hereby ordered that the said trustee pay to Messrs. Scott & Staples ten per cent. of the first $5,000 and five per cent. of the balance, if any, of the aggregate of principal and interest of the claims of Huff, Andrews & Moyler Company; Nelson &

Myers; Smith & King; Castner, Curran & Bullitt and Central Manufacturing Company.

To A. B. Coleman, Esq., ten per cent. of the aggregate of principal and interest of the claims of Fairfax & Bell and Standard Oil Company.

To S. Hamilton Graves, Esq., ten per cent. of the first $5,000 and five per cent. of the balance of principal and interest of the claim of First National Bank of Baltimore.

To Messrs. Watts, Robertson & Robertson ten per cent. of
28 the first $5,000, five per cent. of the next $5,000 and three per cent. of the balance of the claim of the Virginia Iron, Coal & Coke Co.

That Messrs. Cocke & Glasgow be paid ten per cent. of the principal and interest of the claim of West End Supply Company.

5th. It is further ordered that the trustee will make no disbursements under this order until ten days from the entry hereof shall have elapsed.

MEMORANDUM.—Whereas some or all the parties may appeal from, or petition for revision of, some part or all of the foregoing decree, it is further ordered that in the event any party shall, within ten days from this date, appeal from, or petition for a revision of, any part of this decree, such part of such decree shall be superseded pending the adjudication by the appellate court.

HENRY C. McDOWELL, Judge.

Enter Jan'y 14, 1904.

Clerk's Certificate.

UNITED STATES OF AMERICA, Western District of Virginia, } To-wit:

I, William McCauley, clerk of the district court of the United States for the western district of Virginia, at Lynchburg, do certify that the foregoing are true copies of proceedings had and certain papers filed in the matters of C. R. Baird, trading as C. R. Baird & Co., bankrupt, and *and* Roanoke Furnace Company, bankrupt, pending in said court.

Witness my hand and the seal of said court, at Lynchburg, Va., this 18th day of February, A. D. 1904.

Seal of the Court.

WM. McCAULEY, Clerk.

Fees for transcript of record, $11.45.

29 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

VIRGINIA IRON, COAL AND COKE COMPANY ET AL., Petitioners,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupt, *et al.*, Respondents.
} No. 531.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, Lynchburg.

Jan. 21, 1904, petition to superintend and revise is filed, and cause is docketed.

Same day, copy of petition, with notice to respondents to answer, demur or move to dismiss within fifteen days mailed to S. Griffin, attorney for respondents.

Feb. 8, 1904, demurrer to petition is filed.

Same day, answer to petition is filed.

Feb. 22, 1904, transcript of record is filed.

March 25, 1904, 20 copies of printed record are filed.

May 12, 1904 (May term, 1904), cause came on to be heard and is argued before Judges Goff, Morris and Purnell, and submitted.

Nov. 15, 1904, (November term, 1904), the court announced and filed its opinion, which is as follows, to-wit:

30 Opinion.

Filed Nov. 15, 1904.

United States Circuit Court of Appeals, Fourth Circuit.

RECEIVERS OF THE VIRGINIA IRON, COAL AND COKE CO. *et al.*, Petitioners,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt, *et al.*, Respondents. } No. 531.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt, *et al.*, Respondents. } No. 532.

WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt, *et al.*, Petitioners,
vs.
J. ALLEN WATTS, WILLIAM GORDON ROBERTSON, and Edward W. Robertson, *et al.*, Respondents. } No. 533.

Petitions to Supersede and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg, in Bankruptcy.

31 WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt,
vs.
WATTS, ROBERTSON & ROBERTSON, A. B. COLEMAN, S. H. Graves, Scott & Staples, and Cocke & Glasgow. } No. 538.

Cross-appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg.

(Argued May 12 and 13, 1904; Decided Nov. 15, 1904.)

Before Goff, Circuit Judge, and Morris and Purnell, District Judges.

Wm. Gordon Robertson, S. Hamilton Graves and A. P. Staples for petitioners, and Arthur G. Dickson, Samuel & M. Griffin, John Dickey, and Samuel W. Cooper for respondents in 531 and 532; Samuel W. Cooper, Samuel & M. Griffin, and Arthur G. Dickson for Staake, trustee; and Wm. Gordon Robertson and A. P. Staples for respondents and appellees in Nos. 533 and 538.

Statement.

The facts in these proceedings have been agreed upon and are as follows:

Chester R. Baird, trading as C. R. Baird & Co., on December 7th, 1899, owned certain real estate in Virginia, known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to-wit, shares amounting to $500,000 of the capital stock of the said Roanoke Furnace Company.

Under the contract of sale the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the company executed by Baird until November 5th, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000, against
32 Baird as a non-resident of Virginia were issued at the instance of certain of his creditors, and were levied upon the furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the furnace company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the furnace company a lien upon the property so levied upon.

(Code of Virginia, 1887, sections 2463, 2464, 2465, 2472.)

Within four months from the levying of the attachments, to-wit: on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States district court for the eastern district of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the district court of the United States for the western district of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

Under orders of court the property conveyed by Baird to the furnace company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom and all these claims were submitted to the determination of the court below by express consent of all the parties.

Upon the issues made by the petitions and answers the court below ruled that the attachments against Baird, having been obtained through legal proceedings against him, when he was insolvent and within four months prior to the filing of the petition in bankruptcy against him, were null and void under section 67*f* of the bankruptcy act of 1898, so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the benefit of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate, and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done, had not the bankruptcy proceedings interfered. The district court also ruled that the trustee
33 took these liens subject to the claim for compensation of the attorneys who procured the attachments and directed that out of the fund derived from the attachments the reasonable fees of the attorneys representing the attaching creditors should be paid. The grounds upon which the learned district judge based his rulings are ably stated in his opinion filed in the case. These two rulings are the subject of the present cross petitions for revision.

MORRIS, district judge, delivered the opinion of the court:

Section 67*f* provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent, and that the court has on due notice ordered that the right under the attachments shall be preserved for the benefit of the estate and pass to and be preserved by the trustee for the benefit of the estate. There is therefore in the facts of this case a literal gratification of the words of this section. It is con-

tended, however, that as the first clause of the section makes null and void the liens thereon mentioned and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of the clause of 67*f* can have reference only to liens on property, which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.

34 We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee.

A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors does produce equality and prevent preferences.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. This distinction is clearly stated in the following citation from *In re* New York Economical Printing Company, 110 Fed. Rep., 514, quoted by the Supreme Court of the United States in Hewit *vs.* Berlin Machine Works, 194 U. S., 302, "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceeding acts, contemplates that a lien good at that time as against the debtor and as against all his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In the present case the sale by the bankrupt was void as against attaching creditors for want of a recorded deed. The property was levied upon by creditors, and by virtue of the attachments might have been sold under judicial process against the bankrupt. The levy was within four months of the filing of the petition in bankruptcy and under section 67*f* the lien is preserved for the benefit of his estate. In the case of *In re* New York Economical Printing Co., above cited, Judge Wallace, speaking of the right of a trustee in bankruptcy to treat as invalid a chattel mortgage which was not filed in compliance with the laws of New York, and which, under the decisions in that State, could be treated as invalid only by creditors who had obtained judgments and acquired a lien, proceeded

further to say: "Subdivision *b*, sec. 67 (act of 1898), pre-
35 serves for the benefit of the estate in bankruptcy, a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor by an execution, or a creditor's bill, has secured a legal or equitable lien upon mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankru-tcy proceedings, his lien would inure to his own exclusive benefit; but if acquired at any time within four months it would be null and void under subdivision '*f*' of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision '*b*.'"

It is urged that by giving to the trustee of the bankrupt's estate the benefit of the attachments the court is taking from the attaching creditors property which did not belong to the bankrupt and could not have passed to his trustee, but which was a right which the law of Virginia, because of a policy of its own, gave to the creditors in a property which did not in fact belong to the bankrupt.

We think that the Virginia law may well be considered as giving the right to the attaching creditor because *quoad* the attaching creditor the law regards the property so attached as to that extent still remaining the property of the bankrupt because of the want of a proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird that the attachments are liens at all.

We consider the language of section 67*f* so mandatory and imperative that we arrive at the conclusion that the ruling of the court below must be sustained.

The other question is as to the allowance of a reasonable compensation to the attorneys who represented the attaching creditors and whose proceedings produced the fund which now is to pass to the trustee of the bankrupt.

The attaching creditors, in good faith and in a justifiable exercise of the right given to them by the Virginia law, employed counsel to institute proceedings to seize the property which the bankrupt, as it now appears, had sold. By virtue of that seizure and solely by virtue of it, and to the extent of the seizure, the proceeds of those proceedings now pass to the trustee.

The equity of the claim for compensation to be paid out of the fund is very strong.

It is clearly a case in which by an appropriation which the bank-
36 rupt law makes of a fund which came into existence and was preserved by the legal proceedings instituted by the attaching creditors all the common creditors without distinction are benefited. The fund which otherwise the attaching creditors would have secured for their own benefit the bankrupt law says shall be shared equally among all the creditors.

The fund was brought into existence by the exertions of the attaching creditors, and should be considered as in the same class as a fund arising under a creditors' bill, because the bankrupt act declares it shall be so treated. The fund comes into the hands of the trustee of the bankrupt burdened with the charges which were necessarily incurred to bring it into existence. It would appear eminently proper in such a case that the bankruptcy court should in its discretion allow such reasonable counsel fees and expenses as were necessarily incurred in the prosecution of the suits.

Trustees *vs.* Greenough, 105 U. S., 527–534.

The court below carefully considered the amounts proper to be allowed, and with all the facts before it fixed the allowances. We do not find that injustice has been done either to the counsel of the attaching creditors or to the estate of the bankrupt, and we approve the allowances as fair and just.

The orders of the court below are *affirmed.*

PURNELL, district judge, dissenting:

I cannot concur in the foregoing opinion. Upon the facts agreed and the law stated, it is evident to my mind that Congress did not mean by section 67*f* of the bankruptcy act of 1898, to provide for the maintenance or preservation of liens such as those set out in this case. If the attachments were void no lien was acquired thereunder, and if void for one purpose they were void for all purposes. They were not in favor of the bankrupt, but for debts due by him, and I cannot agree that even under the act of Congress a court of bankruptcy can convert a debt or liability into an asset. The trustee under the bankrupt law takes only such property as the bankrupt is entitled to. He was not only entitled to nothing under these attachments, but he was the debtor whose property was attached.

And as to the other question, to-wit: the allowance of reasonable compensation to attorneys who represented attaching creditors and whose proceedings produced the fund, if the fund is to be retained in the bankrupt court, I concur in the opinion that there should be allowance of reasonable compensation, but as to the other question I most respectfully dissent.

37 & 38 Nov. 18, 1904, (same term), the court made and entered the following judgment, to-wit:

Judgment.

Filed Nov. 18, 1904.

United States Circuit Court of Appeals, Fourth Circuit.

RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY *et al.*, Petitioners,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupts, *et al.*, Respondents. } No. 531.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg.

This cause came on to be heard upon the petition, demurrer, answer and the transcript of the record of the proceedings of the district court of the matter for review, and was argued by counsel and submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court, in the matter brought up for review, be, and the same is hereby affirmed, costs will be paid by said trustee.

It is further ordered, that the clerk of this court transmit a copy of this judgment to the said district court forthwith.

NATHAN GOFF.

Nov. 18, 1904.

39 Petition for a Rehearing.

Presented Dec. 9, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

Petition for Rehearing.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.
and
In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

Your petitioner, with all deference to the court, most respectfully asks that it be granted a rehearing upon the record herein, and upon the majority opinion rendered November 15th, 1904, and that the decree entered on November 15th, 1904, be annulled, and that in

lieu thereof, a decree be entered in conformity with the prayer of the original petition filed in this court.

In addition to the severe consequence to petitioner (the total loss of its debt; this is the necessary result, since the claims proven as shown by the original record exceed fourteen hundred thousand dollars, exclusive of interest, and petitioner is advised that the other property of the bankrupt, to-wit, that located in the
40 States of New York, Pennsylvania and New Jersey, has been sold for a comparatively small sum to a combination of the larger creditors), the effect of the majority opinion is so far-reaching, standing, as it does, without a precedent, and by the construction given to section 67–F, makes Congress exceed the power conferred upon it by the Constitution, and over-rides a rule of law settled and established by the United States Supreme Court, and upon the question of "what constitutes a preference," is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit, your petitioner respectfully urges that it be reheard and assigns the following grounds:

1st. The opinion ignores the effect of the most pertinent facts of this case, to-wit: That C. R. Baird sold the furnace property on December 7th, 1899, by a contract valid as to him and his general creditors; and that he executed a deed to the Roanoke Furnace Company, dated November 5th, 1900, and which was recorded on the 7th day of November, 1900.

2nd. The construction placed upon section 67–F, is erroneous; and, if correct, makes the bankruptcy act exceed the constitutional limitations placed upon Congress, extends its operation beyond the limits fixed by the Supreme Court, and results in unreasonable consequences.

3rd. Upon the question of "what constitutes a preference," as that term is used in the bankruptcy act, the opinion is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit.

As to the first ground: The court, fully appreciating the fact that under the terms of the bankruptcy act, and in conformity with the decisions thereunder, in order to sustain the contention of the trustee, it must first ascertain that the attached property was that of the bankrupt, as of the date the petition was filed against him, on page 6 of its opinion, says:

"We think that the Virginia law may well be considered as giving the right to the attaching creditor, because *quoad* the
41 attaching creditor, the law regards the property so attached as to that extent still remaining the property of the bankrupt, because of the want of proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird, that the attachments are liens at all."

This is unquestionably correct prior to, but not subsequent to, November 7th, 1900, since as of that date, every vestige of interest, legal or equitable, because of the record of a valid deed, passed from

Baird, and under the laws of Virginia, neither he, or any one claiming under him, or any creditor of his, either had or could acquire, any interest therein, or lien thereon, because of his previous ownership.

The proposition that, a lien upon property, to the extent of its amount, preserves an ownership in that property, in the debtor, as against his subsequent valid deed, for a full and fair consideration, is to us incomprehensible. Such a rule of law would, as was in effect said by the dissenting judge, "convert a liability into an asset." It would create a new and novel form of ownership, neither founded in reason, or sustained by authority. Suppose, for instance, that the Roanoke Furnace Company had on November 7th, 1900, the date it recorded its deed (which was nearly two months prior to the date the petition was filed against Baird), paid to petitioner the amount of its lien, dissolved the attachment, released the *lis pendens*, and dismissed the suit; could it have been successfully contended in any court, then, or at any subsequent time, by any person whatsoever, that petitioner had disposed of, and the Roanoke Furnace Company, in so doing, had purchased an asset or property belonging to Baird? Unquestionably not. The lien was petitioner's, and the property was that of the Roanoke Furnace Company, and had been for over a year prior to the filing of the petition against Baird.

We are, with all respect to the court, forced to the belief, that it, when considering this case, either lost sight of the contract of
32 purchase and sale dated December 7th, 1899, and of the deed of November 5th, 1900, or failed to appreciate the force and effect of these instruments under the laws of Virginia. Under the laws of this State, the ownership of the furnace property passed under the written contract from Baird on December 7th, 1899. The written contract was valid as to Baird, and as to his general creditors, and was void only as to his lien creditors, as was admitted by respondent counsel during the oral argument.

As to the second ground: The construction placed upon sec. 67–F, is erroneous; and if correct, makes the bankruptcy act exceed the limitations placed on Congress by the Constitution, and extends the operation of the act beyond the limits fixed by the Supreme Court, and results in most unreasonable consequences. It is submitted that in construing the various provisions of the bankruptcy act, it must be constantly borne in mind, that the act deals only with the estate of the bankrupt; that the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the bankrupt's property, and that rights become vested as of the date the petition is filed.

Aside from the cases cited in the brief, the attention of the court is called to Pierie *vs.* Chicago Title & Trust Company, 182 U. S., 449; 45 Law Ed., 1178, in which the court used this language:

"It is hardly necessary to assert that the object of a bankruptcy act, so far as its creditors are concerned, is to secure equality of distribution among them of *the property of the bankrupt*."

Mr. Justice Catron, in the case *Re* Klein, which is cited and approved in Hanover National Bank *vs.* Moyses, 186 U. S., 185; 46 Law Ed., 1118, in discussing the constitutional provision for a national bankrupt act, said:

"Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: To what limits is that jurisdiction restricted? I hold it extends to all cases where the law causes
43 to be distributed *the property* of the debtor among his creditors. This is its least limit."

Mr. Chief Justice Waite, in the case *In re* Deckert, which case was cited and approved in Hanover National Bank *vs.* Moyses, *supra*, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

"But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operations, only such property as could by judicial process be made available for the same purpose. * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

In the case of Hewitt *vs.* Berlin Machine Works (194 U. S., 302), cited by this court in its opinion, p. 5, the limitations of the act was clearly defined when the court used this language:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt, or to his creditors at the time when the trustee's title accrues."

We take it, that in construing sec. 67–F, the court must be bound by the principles above established; that is, that the only lien which can be affected by that section, is a lien which is upon property which can pass to the trustee of the bankrupt; that is, confine its operation to such property as other process could reach as of the date the petition was filed. This court in its opinion, on page 5, says:

"The wording seems clearly to contemplate that a creditor
44 might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted, preserving the lien, if the court should so order, for the benefit of the estate, and vesting it in the trustee."

By this construction, the act is made to deal with the property of a third party: it imposes a penalty upon a creditor of a bankrupt by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party, may have had upon the estate of the bankrupt. It brings into the estate, as an asset, the proceeds from a lien not upon that estate, and one which no process from any court—State or Federal—could have reached as of the date the petition was filed. Such con-

struction, in effect, and in fact, in the case at bar, creates an asset. Assume, for the purpose of illustration, that no sale has yet been made of the furnace property by the Federal court; that under the decree in this case, Staake, trustee, applied to the hustings court of Roanoke city, and was made plaintiff in petitioner's attachment suit there pending; that the Roanoke Furnace Company then appeared and filed its plea, setting up the covenants contained in the deed of November 5th, 1900, from Baird to it. The only replication to such a plea must be, that the trustee is not enforcing the lien because of any interest then, or ever had therein, by the bankrupt grantor, but because of a property right created in the trustee by sec. 67–F of the bankruptcy act. If the trustee was proceeding because of any right or interest which may have existed in the bankrupt, it must defeat the attachment lien, for no one can enforce a lien against his solemn covenant in an instrument under seal.

It is submitted that the proposition involved in the above quotation, to-wit, that there may be a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, is a pioneer. After a most careful search, we have been unable to find any decision of any court, which held that the bankrupt act avoided a lien on any property whatsoever, other than that of the bankrupt which passed to his trustee. It is submitted that the real and true purpose of sec. 67–F, was to procure equality of distribution of a bankrupt's *assets* among his creditors without preference. An apt illustration of the beneficial effect of the provision quoted, is to be found in the case *In re.* Economical Printing Co., which is cited in the opinion, and reported in 110 Fed. Rep., p. 514. In that case, the printing company had mortgaged certain property. Because of the mortgagee's failure to comply with the registry laws of the State of New York, it was contended that the property passed to the trustee free and discharged from the mortgage. This proposition, however, was denied by the court. The mortgaged property, of course, passed to the trustee. A lien had been secured upon that property within the prohibited period of four months. The court held, and very properly held, that the trustee was entitled to the benefit of that lien. Now this presents a case where the lien was taken from the creditor; since the mortgage was held valid, *quoad* the trustee, it would appear that the same results would have been secured to the estate by simply avoiding the judgment lien, as was secured by subrogating the trustee.

We wish to illustrate to the court, a case which might arise, in which the right to preserve the lien would be of material benefit to the estate, and thereby demonstrate the true purpose of the provision in question.

Under the laws of Virginia, in a suit to set aside a fraudulent conveyance, priority is given, not to the first creditor who institutes his suit for that purpose, but to the first creditor who, after instituting his suit, files and causes to be recorded, a *lis pendens*. Now, to

illustrate: In June a creditor filed a bill to set aside as fraudulent a deed made by his debtor, but he does not record the *lis pendens* provided by statute. In September another creditor files his
46 bill for the same purpose, and does record his *lis pendens*. In November the deed is declared null and void, and in December the debtor is adjudged a bankrupt, and the property so fraudulently conveyed passes to his trustee. The word "creditor" in Virginia, means lien creditor, and hence it is not necessary, under the act, that the plaintiff filing his bill in June, should have filed a *lis pendens* as to the general creditors of his fraudulent debtor. Therefore, his lien being four months anterior to the adjudication of bankruptcy, is unaffected by the bankrupt laws, and is valid as against the general creditors of the debtor. The lien of the second petitioning creditor being within four months of the filing of the petition, is void under the bankrupt law. Now comes the beneficial effect of the preservative provision in clause "F": The first lien is valid under the bankrupt law, and is valid as against the general creditors of the debtor, but there being no *lis pendens* recorded, it is void as to the lien of the second creditor. The lien of the second creditor, having his *lis pendens*, is anterior under the State laws, to the lien of the first creditor, but is void under the four-months clause of the bankrupt law. Should the court preserve the lien of the second creditor, it preserves the priority of that lien, and thus preserves for the general creditors that much of the assets of the bankrupt which would have gone to the first creditor instituting the suit, and in the event the property was not more than sufficient to have satisfied his claim, would have taken the entire estate. Thus, a lien otherwise void, is preserved by the court for the benefit of the general creditors.

We call the attention of the court to the quotations on page 6 of the opinion filed, wherein this language is quoted:

"Sub-division *b*, sec. 67 (act of 1898) preserves for the benefit of the estate in bankruptcy, a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy":

and that in the case at bar, the intervention of the debtor's
47 bankruptcy in no way affected the status of the Roanoke Furnace property, nor did it prevent any particular creditor from enforcing a right. The general creditors of Baird were prevented from acquiring any rights by the recordation of the deed of November 5th, 1900, nearly two months prior to the date the petition was filed against Baird. The court says, on page 5 of its opinion:

"The property which was levied upon by creditors, and by virtue of the attachments, might have been sold under judicial process against the bankrupt."

It is most respectfully submitted that while the bankrupt was a necessary party to the suit, yet the suit was not to sell property which belonged to the bankrupt, and consequently, it could hardly be said that it was sold under judicial process against him, within the mean-

ing of the bankruptcy act. As we construe it, this suit was no more a process against Baird, than it would have been had it been to foreclose an ordinary deed of trust in which he appeared as trustee. His interest in the furnace property was gone; it passed from him more than a year before, and the only defense which he could have made in the suit, had he entered an appearance, would have been to question the correctness of the debt.

Third Ground.—Upon the question of "what constitutes a preference," as that term is used in the bankruptcy act, the opinion of this court is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit. This court in its opinion at page 5, says:

"A primary object of the bankrupt law is to prevent preferences, and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality, and prevents preferences."

48 That the property attached in the case at bar was not estate of the bankrupt, which could pass to his trustee, is not questioned. The attachment, if enforced, will not be paid out of the estate of the bankrupt, or out of a fund produced by a sale of his estate. A preference, if petitioner's attachment was not sequestered, but was left to it, would not be created unless this court construed the word "preference," as used in the act, to mean equal percentage of payment to each creditor, regardless of the source from which the fund might be derived, with which such payment might be made. Such a construction of a preference is in direct conflict with the construction given by the circuit court of appeals of the eighth circuit, in the case of Swartz *vs.* Fourth National Bank, 117 Federal Rep., page 1. In that case, at page 7, the court said:

"The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect upon the *equal distributio.. of the estate of the bankrupt*, not its effect upon the creditor, that determines the preference." * * *

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others*, the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. *It is the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt*, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

49 & 50 The payment of petitioner's attachment to it can work no diminution of the bankrupt's estate. The property upon which the attachments were levied were sold by Baird on December 7th, 1899,—more than a year prior to the filing of the peti-

tion in bankruptcy against him, and he received all the consideration to which he was entitled.

In the case *In re* New York Economical Printing Co., hereinbefore referred to, and cited by this court, it was held that the trustee stood in the shoes, so to speak, of the bankrupt, and that a mortgagee who had failed to comply with the registry laws of the State of New York, had a valid prior lien upon the mortgaged property *quoad* the trustee; then how can it be possibly questioned, under this authority, but that a purchaser for value, who for a time only, fails to comply with the registry laws of Virginia, has a right of property superior to the trustee? We submit that under this authority, the Roanoke Furnace property, even though no deed had ever been recorded, would not have passed to Baird's trustee. Then, certainly, with a deed admittedly valid and properly recorded, by no possibility could anything pass to the trustee.

Your petitioner most respectfully urges that it be given a rehearing, and that, thereupon, such decree may be entered as will give to your petitioner the sole benefit of its attachment lien.

Respectfully,

RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY AND OTHERS,
By WM. GORDON ROBERTSON,
A. P. STAPLES, Counsel.

I, Wm. Gordon Robertson, a practising attorney in the United States circuit court of appeals for the fourth circuit, do hereby certify that, in my opinion, a rehearing should be granted as asked for in the foregoing petition, and upon the grounds therein stated and that a decree should be entered giving to petitioner the benefit of its attachment lien.

Given under my hand this 5th day of December, A. D. 1904.

WM. GORDON ROBERTSON.

51 Dec. 9, 1904, mandate stayed pending petition for a rehearing.

Order Denying a Rehearing.

Filed Feb. 7, 1905.

United States Circuit Court of Appeals, Fourth Circuit.

RECEIVERS OF VIRGINIA IRON, COAL AND COKE CO. ET AL., Petitioners,
vs.
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupts, *et al.*, Respondents. } No. 531.

On Petition for Review, &c., of the District Court of the United States for the Western District of Virginia.

This court having at its November term, 1904, rendered its decision affirming the judgment of the district court in this cause, and the petitioners, by *its* attorney, having on December 9, 1904, presented to the court a petition for a rehearing of the cause.

It is now here ordered, by this court, that the rehearing asked for, be, and the same is hereby denied.

NATHAN GOFF,
Circuit Judge Presiding.

Feb. 7th, 1905.

Feb. 21, 1905, (February term, 1905), mandate stayed 30 days to allow petitioners to file their application in the supreme court for a writ of certiorari.

52 Clerk's Certificate.

UNITED STATES OF AMERICA, Fourth Circuit, } *ss.:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said circuit court of appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals, fourth circuit, this 10th day of March, A. D., 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

53 United States Circuit — of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return to the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 12th day of April 1905, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken, as a return to said writ, dated the 14th day of April A. D. 1905.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals on this 17th day of April A. D. 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.

C. M. D.

54 United States Circuit Court of Appeals for the Fourth Circuit.

RECEIVERS OF VIRGINIA IRON, COAL & COKE CO. ET ALS., Petitioners,
vs.
WM. H. STAAKE, Trustee of C. R. Baird, Trading as C. R. Baird & Co., Respondent.
No. 531.

It is hereby stipulated that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the 14th day of April A. D. 1905.

S. HAMILTON GRAVES,
WM. GORDON ROBERTSON,
EDWARD W. ROBERTSON,
Of Counsel for Receivers of Virginia Iron, Coal & Coke Co. *et al.*

S. & M. GRIFFIN,
Of Counsel for W. H. Staake, Trustee.

UNITED STATES — AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit do certify that the above stipulation of counsel is a true copy of the original filed April 17, 1905, and now remaining among the records and proceedings in the therein entitled cause.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals, at Richmond, on this 17th day of April, A. D. 1905.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Ct.

C. M. D.

55 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

Being informed that there is now pending before you a suit in which Receivers of Virginia Iron, Coal and Coke Company *et al.*, are petitioners, and William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, No. 531, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do
56 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of April, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

57 [Endorsed:] File No. 19,684. Supreme Court of the United States, October term, 1904. No. 584. Henry K. McHarg & A. A. Phlegar, receivers &c., *et al.*, *vs.* Wm. H. Staake, trustee, &c. Writ of certiorari. The execution of the within writ appears from certain schedules thereto annexed. Henry T. Meloney, cl'k U. S. C. C. appeals. April 17, 1905.

58 [Endorsed:] File No. 19,684. Supreme Court U. S., October term, 1904. Term No. 584. Henry K. McHarg & A. A. Phlegar receivers &c. *et al. vs.* Wm. H. Staake, trustee &c. Writ of certiorari and return. Filed April 18", 1905.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE,
PETITIONER,

vs.

WM. H. STAAKE, TRUSTEE, &C., ET AL.,

AND

No. 214.

HENRY K. McHARG ET AL., RECEIVERS, &C., ET AL.,
PETITIONERS,

vs.

WM. H. STAAKE, TRUSTEE, &C.

CERTIFIED COPY OF EXHIBIT No. 2.

EXHIBIT No. 2.

An agreement, made this seventh day of December, 1899, by and between Chester R. Baird (hereinafter called the "vendor"), of the first part, and Roanoke Furnace Company, a corporation organized under the laws of the State of New Jersey, having its registered principal office with the New Jersey Corporation Guarantee and Trust Company, at No. 419 Market street, Camden, New Jersey (hereinafter called the "company"), of the second part.

Whereas, the vendor is the owner of the property and rights hereinafter described; and

Whereas, the company has been duly organized pursuant to the laws of the State of New Jersey, with an authorized capital stock of $500,000, divided into shares of the par value of $100 each; and

Whereas, the company desires by an issue of its capital stock as hereinafter provided, to purchase and acquire said property and rights; and

Whereas, the board of directors of the company have ascertained, adjudged and declared, that the said property and rights are of the fair value of five hundred thousand dollars ($500,000), and that the acquisition of said property and rights is necessary for the business of the company and to carry out its contemplated objects:

Now therefore, it is hereby agreed, by and between the vendor and the company as follows:

1. The vendor has sold, assigned, transferred and set over, and does hereby sell, assign, transfer and set over unto the company, its successors and assigns, all his right, title and interest in and to the following described property, to wit:

All of his interest in the furnace plant, formerly operated by the Roanoke Iron Company, at Roanoke, Va., subject to the payments still owing on the agreement with Robert E. Tod, which are hereby assumed by the company.

This property does not include the rolling-mill plant.

2. The company hereby agrees, in consideration of said sale and upon the delivery of said property to it, to issue to the vendor and his nominees as hereinafter provided, or to such other nominees as the vendor shall in writing hereafter direct, at such time and in such amounts as they shall respectively direct, certificates of stock of the company to the aggregate amount of five thousand shares, and said shares shall be deemed to be and are hereby declared to be full-paid shares and not liable to any further call, and the holders of such stock shall not be liable to any further payment thereon.

3. Said stock shall be issued in part as follows:

To—	Shares
Chester R. Baird	10
Nicholas H. Wagner	10
George F. Eldredge	10
James Collins Jones	10

4. The balance of said stock shall, unless otherwise directed in writing by the vendor, be issued as follows:

To—	Shares.
The vendor, Chester R. Baird	4959
George H. B. Martin	1

5. The delivery of the certificates for said shares to the above-named parties and their respective receipts for the same shall be a full discharge of each of the parties hereto to the extent thereof.

It is understood and agreed that the shares to be issued to the parties named in paragraph 3, hereof are the shares subscribed by the incorporators of the company, as set forth in the certificate of incorporation.

6. The vendor hereby covenants and agrees with the company, upon the request and at the cost of the company, to execute and to do all such further assurances and things as shall reasonably be required by the company for vesting in it the property and rights agreed to be hereby sold, and giving to it the full benefit of this agreement.

Witness, the hand and seal of the vendor and the corporate seal of the company, attested by the signatures of its officers thereunto duly authorized, the day and year first above written.

(S'g'd) CHESTER R. BAIRD. [SEAL.]
ROANOKE FURNACE COMPANY,
By C. R. BAIRD, *Pres't.*

Attest:
[CORPORATE SEAL.]
N. H. WAGNER, *Sec'y.*

In presence of—
JAMES COLLINS JONES.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

I, Jacob Mann, a notary public in and for the State of Pennsylvania and county aforesaid, do certify that Chester R. Baird, individually, and Chester R. Baird, the president, and Nicholas H. Wagner, the secretary, of the Roanoke Furnace Company, whose names are signed to the foregoing writing, have each acknowledged the same before me in my county aforesaid.

Given under my hand and notarial seal this 15th day of October, 1900.

(S'g'd) JACOB MANN,
[NOTARY SEAL.] *Notary Public.*

This deed made the fifth day of November in the year nineteen hundred between Chester R. Baird of the city of Philadelphia and State of Pennsylvania of the first part and the Roanoke Furnace Company, a corporation duly incorporated under the laws of the State of New Jersey and duly registered in the State of Virginia of the second part—

Witnesseth, that in consideration of the issuing and delivering heretofore of certain shares of the capital stock to the amount of five hundred thousand dollars, of the said Roanoke Furnace Company in pursuance of a certain agreement between the parties hereto the receipt heretofore of the certificates for which shares is hereby formally acknowledged the said Chester R. Baird, hath granted, bargained, sold and conveyed and doth hereby grant, bargain, sell and convey unto the said Roanoke Furnace Company its successors and assigns forever with general warranty, all the following-described furnace property lying partly in the city of Roanoke and partly in the county of Roanoke, Virginia, and comprising about fifty-two and three-quarters (52¾) acres of land forty-four and seven-eighths (44⅞) acres in Roanoke City, and seven and seven-eighths acres in Roanoke county, to wit:

First. Beginning at a sycamore tree on the north bank of Roanoke river, designated as "1;" thence north twenty-eight and three-fourths (28¾) degrees west twenty (20) poles to a point in the road; thence along said road north thirty-seven and one-fourth (37¼) degrees west thirteen poles and north twelve and one-fourth (12¼) degrees west seventeen (17) poles to the line of the Norfolk and Western Railroad Company's lands at "2;" thence with the line of the said company's lands in a southwesterly direction one hundred and ninety and one-half (190½) poles to the line of Jacob Trout's lands at "3;" thence with said Trout's lands south seven and one-half (7½) degrees east five (5) poles to three white oaks at "4" on the north bank of Roanoke river; thence down the river as it meanders, following the usual water mark one hundred and ninety and one-half (190½) poles to the place of beginning containing forty-four and seven-eighths (44⅞) acres and being the same land conveyed to the Roanoke Iron Company by C. G. Nininger and others, by deed dated the seventh (7th) day of November, A. D. 1889, and recorded in Deed Book 3, page 117, in the office of the clerk of the county court of Roanoke county, Virginia.

Second. Beginning at a sycamore tree on the bank of Roanoke river at "1" corner to the lands of Asberry & Taylor; thence with the same south twenty-two (22) degrees west, five and three-tenths (5.3) poles to a locust on the bank of the mill-race at "2;" thence up the north bank of said race as it meanders one hundred and thirty-five and nine-tenths (135.9) poles to a double locust on the east side of an outlet of the said race at "3;" thence fifty-nine (59) degrees west two (2) poles to the bank of the river at "4;" thence down the bank of the river at common high-water mark, as it meanders passing by a sycamore at ninety poles at mouth of boat sluice in all one hundred and fifty-three (153) poles to the beginning, containing seven (7) acres three (3) roods and thirty (30) poles and being the same land conveyed to

the said Roanoke Iron Company by E. W. Sykes and Ella J. Sykes by deed dated the fourth day of February, A. D. 1891, and recorded in Deed Book 7, page 70, in the office of the clerk of the county court of Roanoke county, Virginia.

Together with the furnace, all structures, buildings, cars, machinery and fixtures, tools and implements, whatsoever, formerly owned by the said Roanoke Iron Company, thereon erected, therein contained or used in connection therewith.

Being the same property conveyed to Robert E. Tod, by David W. Flickwir and H. Peyton Gray, special commissioner under deed dated the sixth day of October, 1897, recorded in Deed Book 109, page 68 of the hustings court clerk's office of the city of Roanoke, Virginia and in Deed Book 17, page 280, in the clerk's office of Roanoke county court, Virginia.

Excepting therefrom the rolling-mill plant.

And the said Chester R. Baird covenants that the grantee shall have quiet possession of the said land free from all encumbrances, and that he, the said Chester R. Baird will execute such further assurances of the said lands as may be requisite. It is expressly understood and agreed however, that this conveyance has been made subject to the payment by the said Roanoke Furnace Company of the balance of purchase-money due or to become due to Robert E. Tod, on the land of which the hereby granted premises are a part the payment of which balance of purchase-money has been assumed by the said Roanoke Furnace Company.

Witness the following signature and seal.

CHESTER R. BAIRD. [SEAL.]

Witnesses:

JACOB MANN.

THOS. W. ANDREW.

($500 U. S. internal-revenue stamp, canceled.)

STATE OF PENNSYLVANIA, *County of Philadelphia, to wit:*

I, Jacob Mann, notary public for the county aforesaid, for the State of Pennsylvania, do hereby certify that Chester R. Baird, whose name is signed to the writing above, bearing date on the 5th day of November, 1900, has acknowledged the same before me in my county aforesaid.

Given under my hand this the 5th day of November, 1900.

(S'g'd) JACOB MANN,
[NOTARY SEAL.] *Notary Public.*

Acknowledgment notary.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

I, M. Russell Thayer, a prothonotary of the county of Philadelphia and clerk of the courts of common pleas of the county of Philadelphia, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that Jacob Mann, Esq., whose name is subscribed to the certificate of acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a notary public for the Commonwealth of Pennsylvania, residing in the county aforesaid, duly commissioned and qualified to administer oaths and affirmations and take acknowledgments and proofs of deeds or conveyances for lands, tenements, hereditaments, to be recorded in said State of Pennsylvania, and to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature and elsewhere, and that I am well acquainted with the handwriting of the said notary public and verily believe the signature thereon is genuine; and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

In testimony whereof I have hereto set my hand and affixed my seal of said court this 5th day of November, in the year of our Lord one thousand nine hundred.

(Sgn.) M. RUSSELL THAYER,
[NOTARY PUBLIC.] *Prothonotary.*

In the clerk's office of the hustings court for the city of Roanoke, Virginia, the 7th day of November, 1900, this deed was presented and, with the certificates annexed, admitted to record at 11.45 o'clock a. m., with $500 I. R. canceled.

Teste:

(Sng.) S. S. BROOKE, *Clerk.*

In the clerk's office of the county court for the county of Roanoke the 8th day of November, 1900, this deed was presented and, with the certificates annexed, admitted to record, having affixed thereto, duly canceled, United States internal-revenue stamps of the value of $500.

Teste:

(Sgn.) THOS. I. PRESTON, *Clerk.*
D.

Endorsed: "In D. B. 125, page 149, clerk's office, hustings court, city of Roanoke."

"Recorded in Deed Book No. 22, page 402, and examined. Roanoke Co."

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

In the United States Circuit Court, Clerk's Office, at Lynchburg, Va., March 10, 1906.

The above is a true copy of Exhibit No. 2 filed with the petition of Wm. H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, and in the matter of Roanoke Furnace Company.

Witness my hand and seal of said court the day and date above mentioned.

[SEAL.] WM. MCCAULEY, *Clerk.*

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

The First National Bank of Baltimore,
Petitioner,

v.

William H. Staake, Trustee of C. R. Baird & Company, Bankrupts,
Respondent.

To William H. Staake, Trustee of C. R. Baird & Company, Bankrupt:

You are hereby notified that on Monday, March 27th, A. D. 1905, at the motion hour, I will file a petition and enter a motion before the Supreme Court of the United States at Washington, D. C., to grant a writ of *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit to require said Court to certify to the Supreme Court of the United States for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the First National Bank of Baltimore was petitioner, and William H. Staake, Trustee for, etc., was respondent, being No. 532.

S. HAMILTON GRAVES,
Counsel for First National Bank of Baltimore, Md.

Notice of the foregoing motion is hereby accepted and other service waived this the 13th day of March, A. D. 1904.

WILLIAM H. STAAKE,
Trustee for, Etc.

By S. & M. GRIFFIN,
Counsel.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1904

FIRST NATIONAL BANK OF BALTIMORE, MD., Petitioner

v.

WILLIAM H. STAAKE, TRUSTEE OF

C. R. BAIRD & COMPANY, BANKRUPTS, Respondent

Petition for writ of certiorari, to the United States Circuit Court of Appeals for the Fourth Circuit, requiring it to certify to the Supreme Court of the United States, for its review and determination, the case of the First National Bank of Baltimore, Petitioner, versus William H. Staake, Trustee of C. R. Baird & Co., Bankrupt, et al., Respondent, No. 532, lately depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the First National Bank of Baltimore, respectfully shows:

I.

1st. That the questions of law involved in this cause are novel, of peculiar gravity and of vital importance in the general administration of the Bankruptcy Act of 1898 (30 Stat. at L. 565 U. S. Comp. Stat. p. 3450); they arise upon the construction to

be placed upon and the effect to be given Sec. 67f of that act, which is as follows:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry."

The questions, as presented, have not heretofore been directly passed upon so far as we can ascertain by any court, save in this cause, and in the abstract are:

(*a*) Is a lien void (in the absence of fraud) under Sec. 67f, *quoad* a bankrupt's trustee which is not to the prejudice of a bankrupt's creditors, and which is not upon and does not affect property belonging to the bankrupt, or property which his general creditors could have subjected as of the date the petition in bankruptcy was filed? In other words: Is an attachment which is in favor of a creditor of a bankrupt and which is a *valid lien* upon the property of a third party, void *quoad* the trustee of the bankrupt?

(*b*) Can the trustee of a bankrupt be subrogated to the rights of a creditor of a bankrupt, in an attachment which is *a lien only upon property*, which was no part of the bankrupt's

estate when the petition was filed, and which consequently could not pass to the trustee under Sec. 70 of the act?

(*c*) Can the trustee of a bankrupt cause to be declared void the lien of, and be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, but which is a valid lien *quoad* the owner of the attached property, when if such lien be enforced for the sole benefit of the attaching creditor it will work no diminution of the bankrupt's estate?

2nd. The question of what constitutes a *preference* as that term is used in the Bankruptcy Act of 1898, is also involved, and the construction given thereto by the Circuit Court of Appeals of the Fourth Circuit in this cause, is in direct conflict with the construction given thereto by the Circuit Court of Appeals of the Eighth Circuit. That a decision of this question by your Honorable Court is necessary to secure uniformity of decision in the administration of the Bankruptcy Act.

II.

The facts of this cause were agreed upon (R., pp. 9-14 inc.) and the Honorable Judge Morris, who wrote the opinion (R., p. 31) of the Circuit Court of Appeals, gives this summary:

"Chester R. Baird, trading as C. R. Baird & Co., on December 7, 1899, owned certain real estate in Virginia known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to wit, shares amounting to $500,000 of the capital stock of the said Roanoke Furnace Company.

"Under the contract of sale the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the Company was executed by Baird until November 5, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of Octo-

ber, 1900, nine different attachments, amounting to over $40,000, against Baird as a non-resident of Virginia, were issued at the instance of certain of his creditors (one of which was the First National Bank of Baltimore, Maryland), and were levied upon the Furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon (Code of Virginia, 1887, Sections 2463, 2464, 2465, 2472). Within four months of the levying of the attachments, to wit, on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

"Under orders of Court the property which was theretofore conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom, and all these claims were submitted to the determination of the court below by express consent of all the parties."

The agreed facts further show (R., p. 13): "That the proceeds from the sale when made by the officers of the Court, of the property conveyed by the deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company, were not only sufficient to pay off and discharge all liens thereon prior to that

of the First National Bank of Baltimore, but were also sufficient to pay off and discharge the lien of said bank, as evidenced by said attachment, principal, interest and costs.

"That a sufficient part of the proceeds of sale from said property to pay off the amount due the First National Bank of Baltimore is now in the hands of said Trustees under the last decrees aforesaid.

"That the balance due said Bank, exclusive of the costs incurred in the Hustings Court, is $8,152.06 with interest thereon at 6 per cent. from the 11th day of November, 1902."

This was also agreed (R., p. 12): "That the deed of November 5, 1900, from said Baird to the Roanoke Furnace Co., was a valid conveyance to a purchaser in good faith for a then fair consideration, and was not affected by the Bankruptcy proceedings hereinbefore mentioned."

That subsequent to the sale of the attached property, and the signing of the agreed statement of facts, a petition was filed in the "In re Roanoke Furnace Company, Bankruptcy proceedings," in the District Court of the United States for the Western District of Virginia by William H. Staake, Trustee for C. R. Baird, wherein it was asked *inter alia*, that the lien acquired by your petitioner upon the property known as the "West End Furnace Property" (which was the property conveyed by deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company), be declared void as to him, and that it be preserved by the Court for his benefit as Trustee of C. R. Baird (R., p. 6); to this petition (R., pp. 15-16) a demurrer and answer was filed by the First National Bank of Baltimore.

III.

Upon the hearing of the issues made by said petition, and the demurrer and answer thereto, the District Court overruled the demurrer and in effect decided and held that the attachment lien having been obtained through legal proceedings to which Baird was a party, he being insolvent, and within four months prior to the filing of the petition in Bankruptcy against him, was

null and void under Sec. 67f of the Bankruptcy Act of 1898, and though the property attached was not the property of C. R. Baird when the bankrupt petition was filed, that power was given to the court by said section to enforce liens for the benefit of all the creditors, even though said liens might not be annulled under said Sec. 67f (R., p. 22); that if one creditor was paid in full while other creditors received only a portion of their claims, a preference would be created, though the payment to the creditor who was paid in full was from a source other than the bankrupt's estate; that Sec. 67f is not confined to liens that create a preference, that if the attachment was held to be valid *quoad* Staake, Trustee, it would give a preference to your petitioner; the court then declared the lien void as to said trustee and ordered that it be preserved for the benefit of Baird's estate, and on January 14, 1904 (R., p. 24), ordered as follows: "That the rights acquired by the Attachment proceedings in the Hustings Court of the City of Roanoke by the attaching creditor, to wit, the First National Bank of Baltimore, Maryland, be preserved for the benefit of the estate of the said C. R. Baird, Bankrupt, and that said petitioner, William H. Staake, Trustee of the said estate, be and he is hereby subrogated to said rights and authorized and empowered to enforce the attachment lien with like force and effect as the said attaching creditor might have done had not the Bankruptcy proceedings intervened."

IV.

On January 22, 1904, your petitioner filed in the United States Circuit Court of Appeals for the Fourth Circuit its petition, wherein it prayed the jurisdiction of said Court under the provisions of Sec. 24b of said Bankruptcy Act, and that said Court superintend and revise in matter of law the proceedings and findings of the District Court, and that said Court revise, reverse and annul that portion of the decree of January 14, 1904, as is last above set forth (R., 1-2).

That in said Circuit Court of Appeals said case was docketed as follows: "First National Bank of Baltimore, Petitioner, v.

William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, et al., Respondents," and was entered as No. 532.

That said case was on May 12 and 13, 1904, argued and submitted in said Court; that on November 15, 1904, the said Circuit Court of Appeals rendered an opinion per Morris, District Judge, concurred in by Goff, Circuit Judge (R., p. 31), and entered an order confirming the judgment of the District Court in the matter brought up for review; that District Judge Purnell, the other member of the Court sitting in the case, filed a dissenting opinion (R., p. 36). Your petitioner on December 9, 1904 (R., p. 39), filed a petition in said Circuit Court of Appeals, wherein it prayed that a rehearing be granted to it upon the original record therein and upon the majority opinion rendered November 15, 1904, that the decree entered on that date be annulled, and that in lieu thereof a decree be entered in conformity with the prayer of its original petition. The prayer of the petition to rehear was denied by said Court by an order entered February 7, 1904 (R., p. 51).

That among the propositions of law decided and established by the majority opinion of the Circuit Court of Appeals, and by its affirming the opinion of the District Court, are these:

(1) That by virtue of Sec. 67f of the Bankruptcy Act of 1898, an attachment which was levied by a creditor of a bankrupt and became a valid lien under the laws of the Commonwealth of Virginia upon certain real estate, which could not pass to the Bankrupt's trustee, the ownership of and title to said real estate, both legal and equitable, being in a third party at the time the petition in bankruptcy was filed, is void *quoad* the bankrupt debtor's trustee; though said lien is admitted to be valid *quoad* the owner of the property attached.

The attached real estate having been sold to such third party by the bankrupt twelve months prior to the filing of the petition in bankruptcy, for a fair consideration, the entire purchase price paid without diminution because of said attachment, and a deed admittedly valid, executed, delivered and recorded forty-nine days prior to the filing of the petition in bankruptcy.

(2) That the trustee of a bankrupt, under and by virtue of

Sec. 67f, shoud be subrogated to the rights of an attaching creditor in an attachment, *which is a lien upon the property of a third party;* property in which the bankrupt had neither ownership or title, either legal or equitable, property which the bankrupt could not have transferred, and which could not have been levied upon under judicial process against him within forty-nine days next prior to the filing of the petition in bankruptcy. In other words, that under said section, the trustee of a bankrupt is made the beneficial owner of a lien, which is upon property which could not pass to him as such trustee under Section 70 of the Bankruptcy Act. That such ownership is vested in him by virtue of the fact that the lien was procured by a creditor of the bankrupt, and not because the lien has any effect whatsoever upon the estate of the bankrupt.

(3) That under and by virtue of Section 67f, a trustee of a bankrupt should be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, and should enforce such lien for the benefit of all the creditors, when without such subrogation the lien would not be annulled or the property affected discharged therefrom under Sec. 67f. In other words, that the trustee should be subrogated to the rights of a creditor in an attachment, the lien of which is valid.

(4) That a preference within the meaning of the act is secured, if one creditor receives the full amount of his debt and another does not, even though the creditor who receives payment in full receives nothing from the estate of the bankrupt, but is paid entirely out of property which did not belong to the bankrupt, and which could not be subjected by or pass to his trustee. In other words, that unless each creditor receives equal percentage of payment, regardless of the source from which payment is secured, there is a preference.

A certified copy of the entire record of said case in the Circuit Court of Appeals is hereto annexed as a part of this application, in conformity with Rule 37 of this Honorable Court.

V.

Your petitioner most respectfully represents that the construction given Sec. 67f by said Circuit Court of Appeals of the Fourth Circuit is erroneous. Its effect is to extend the operation of the Bankruptcy Act beyond the limits fixed by your Honorable Court, and to nullify a principle of law which heretofore has been recognized by the bench and bar of this country as irrevocably established, to wit: That the Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); that the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the property of the bankrupt which passes, or should pass to his trustee, and that rights become vested as of the date the petition is filed.

In the case of Hewitt v. Berlin Machine Works (194 U. S. 302, 48 Law Ed., p. 988,. the court adopted and approved the language of the C. C. A. of the Second Circuit, and said:

> "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors, shall remain undisturbed."

In the case of Pierie v. Chicago Title and Trust Co. (182 U. S., 449: 45 Law. Ed. 1178), the Court used this language:

> "It is hardly necessary to assert that the object of a Bankruptcy Act, so far as creditors are concerned, is to secure equality of distribution among them of *the property of the Bankrupt.*"

Mr. Justice Catron, in the case re. Klein, which is cited and approved in Hanover National Bank v. Moyses (186 U. S., 185: 46 Law Ed., 1118), in discussing the constitutional provision for a national bankrupt act, said:

> "Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: *To what limits is that jurisdiction restricted?* I hold it extends to all cases where the law causes to be distributed

the property of the debtor among his creditors. This is its least limit."

Mr. Chief Justice Waite, in the case in re. Deckert, which case was cited and approved in Hanover National Bank v. Moyses, supra, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

> "But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. * * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

That the property attached in the case at bar was not estate of the bankrupt which could pass to his trustee or which could have been reached by process 49 days next prior to the date the petition was filed against him is admitted. That the attachment, if enforced for the petitioner's benefit, will not be paid out of the estate of the bankrupt, Baird, or out of funds derived from a sale of his estate, is not questioned: yet, under these facts the Circuit Court of Appeals has held that the payment of petitioner's attachment to it would create a preference within the meaning of the act (R., p. 34).

In effect that a preference would be created unless an equal percentage of payment was made to each creditor of the bankrupt, regardless of the source from which the fund might be derived with which such payment might be made. Such a construction of a preference is not only erroneous, but is in direct conflict with the construction given by the Circuit Court of Appeals of the Eighth Circuit in the case of Swartz v. Fourth National Bank (117 Federal Rep., page 1). In that case, at page 7, the Court said:

> "The test of a preference, as we have seen, is

whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect upon the *equal distribution of the estate of the bankrupt*, not its effect upon the creditor that determines the preference.

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others*, the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. *It is the relations of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt*, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

Your petitioner further represents, that in addition to the general importance of the propositions of law involved as presented by this petition, the decision is in conflict with those of the courts of last resort of Massachusetts, North Dakota, Kansas and Georgia; those courts having held, that the liens prohibited by § 67f are those upon property which passes to the trustee; (see brief p. 17) and that upon the question of "What constitutes a preference?" it is essential for the uniform construction and administration of the Bankruptcy Act in the Fourth and Eighth Circuits that the conflicting opinions should be harmonized and that this court of last resort should decide and determine which rule of construction should be adopted.

VI.

Your petitioner respectfully represents to this Honorable Court that no appeal is allowed it to this Court and that its only remedy is by petition for writ of certiorari under Section 25d of the Bankruptcy Act of 1898 (C. 541, § 25, 30 Stat. 553—U. S. Comp. Stat., p. 3432).

Wherefore your petitioner respectfully prays, that the writ of certiorari may be issued out of and under the seal of this Court,

directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record in all proceedings of the said Circuit Court of Appeals of the said case, entitled, "First National Bank of Baltimore, Petitioner, v. William H. Staake, Trustee of C. R. Baird & Co., Bankrupt, et al., Respondents, No. 532," to the end that the said cause may be reviewed and determined by this Court as provided by law; and that the judgment of the said Circuit Court of Appeals in said case be revised, reversed and annulled, and that this Honorable Court enter and cause to be entered such orders as may be necessary to secure to petitioner the full benefit of its attachment lien hereinbefore referred to, and to which it is clearly entitled. And may your petitioner have such other or further relief and remedy in the premises as to this Court may seem appropriate; and your petitioner will in duty bound ever pray.

S. HAMILTON GRAVES,
Counsel for Petitioner.

State of Virginia,
City of Roanoke, } To wit:

S. Hamilton Graves, being duly sworn, says that he is Counsel for the First National Bank of Baltimore, Md., the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

S. HAMILTON GRAVES.

Subscribed and sworn to before me, this 16th day of March, A. D. 1905.

My commission as Notary Public expires on April 6th, A. D. 1907.

CHAS. I. LUNSFORD,
Notary Public for City of Roanoke, State of Virginia.

SEAL

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

First National Bank of Baltimore, Md., Petitioner.

v.

William H. Staake, Trustee of C. R. Baird, Respondent.

Brief for Petitioner on Application for Writ of Certiorari.

As the petition for a writ of certiorari contains a concise statement of the most pertinent facts, it is not deemed necessary to give here more than a brief abstract.

In December, 1899, C. R. Baird was the owner of various properties located in Roanoke, Va., one of which was designated as the "West End Furnace Property."

That on December 7, 1899 (R., p. 11, § 8), he sold said last named property to the Roanoke Furnace Company, a corporation.

That he received (R., p. 12, § 9) the entire purchase price to which he was entitled.

That the Roanoke Furnace Company (R., p. 11, § 8) failed to immediately record, as required by the registry laws of Virginia, the written evidence of its purchase.

That on October 26, 1900 (R., p. 9, § 1), petitioner attached said "West End Furnace Property" for a debt due to it by C. R. Baird.

That on November 7, 1900 (R., p. 11, § 9), the Roanoke Fur-

nace Company recorded a deed from C. R. Baird, which conveyed said property to it in fee.

That on December 24, 1900 (R., p. 10, § 2), a petition in bankruptcy was filed against C. R. Baird.

That William H. Staake was subsequently appointed the trustee for Baird's estate.

That on December 29, 1900 (R., p. 10, § 5), a petition in bankruptcy was filed against the Roanoke Furnace Company.

That in the in re. Roanoke Furnace Company bankruptcy proceedings, Staake, the trustee of Baird, filed a petition and prayed to be subrogated to the rights of the Bank in its attachment against the "West End Furnace Property."

It will not be contended that the "West End Furnace Property" could or should pass to Baird's trustee.

It will not be denied that all title, interest, and equity in said property did pass to the trustee of the Roanoke Furnace Company, subject to the attachment lien.

It is submitted that the proposition as established in this case, That a lien which is upon property which can not pass to the trustee of the bankrupt is void, under Sec. 67f of the Bankruptcy Act, quoad such trustee, is a novel one, and is of such general importance that this Court should grant the writ prayed for, and determine this question. The Court, in its opinion (R., p. 33), in discussing said section, used this language:

> "It is contended however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter clause of 67f can have reference only to liens on property, which, if the liens were annulled would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the most obvious meaning of the words. The wording seems clearly to contemplate *that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy*, and it would appear

that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee."

The proposition involved in the above quotation, to wit, that a creditor, by reason of his being such, may secure a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, is a pioneer. It imposes a penalty upon a creditor of the bankrupt, by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party may have had upon the estate of the bankrupt. It brings into the estate as an asset the proceeds from a lien, not upon that estate but upon property which no process from any court, state or federal, could have reached at the instance of the bankrupt or his creditors, as of the date the petition was filed. It, in effect and in fact, in the case at bar, creates an asset. After a most careful search, we have been unable to find any decision of any court, holding that the Bankrupt Act avoided a lien on any property whatsoever other than that of the bankrupt which passed to his trustee. It has not heretofore been contended that a bankrupt court could take jurisdiction of a creditor of a bankrupt, for the sole reason that he was such. The jurisdiction of the bankrupt court, aside from the question of discharge, has heretofore been confined to the administration of the bankrupt's estate which passed to the trustee. So far as we know, this is the first case in which it has been held that the liens prohibited by Sec. 67f were other than those upon property which passed to the trustee of the bankrupt. The contrary has been held by the courts of last resort of N. Dakota, Mass, Kan. & Ga.

In Powers Dry Goods Co. v. Nelson (10 N. D., 580), the Court said:

"Section 67f after declaring that all attachments levied within four months prior to the filing of the petition shall be null and void, and discharged and released, declares that the effect of such a discharge shall be to pass the property covered by the lien "*to the trustee as a part of the estate of the bankrupt.*" It is entirely plain that this section does not refer to

liens upon property which the court does not undertake to administer and over which it has no jurisdiction. * * * If defendant's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property, is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; * * * no such absurd construction can be sustained."

In Frazee v. Nelson (61 N. E., R., p. 40) the Supreme Judicial Court of Massachusetts held:

> "The effect of Section 67f of the U. S. Bankruptcy Act of July 1, 1898, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy, and those claiming under him, *so that the property may pass to and be distributed by him among the creditors of the bankrupt.*"

In McKenny v. Cheney (Vol. 11, A. B. R., p. 54) the Supreme Court of Georgia cites with approval the construction given Sec. 67f by the Supreme Courts of Massachusetts and North Dakota. And also cites with approval, the case of Robertson v. Wilson (15 Kansas, 595). And says:

> "In the Kansas case the Court said:
> "'As the bankrupt court gets no jurisdiction of the exempt property, it would seem that it should take none over any specific liens upon such property. The lien in that case was that of an attachment levied within four months prior to the adjudication in bankruptcy. It was held that, as the homestead did not pass to the assignee in bankruptcy, the bankruptcy proceedings did not dissolve the attachment.'"

The object of the Bankruptcy Act, the fundamental principle upon which it is founded so far as creditors are concerned (other than the subject of discharge), is to take possession of, through the medium of a trustee, *the property* of the insolvent debtor, convert same into money and distribute it among the general creditors without preference. For that purpose, and that alone, the Bankruptcy Act declares void certain liens ac-

quired within a specified time upon the property of the bankrupt,

Mayer v. Hellman, 91 U. S. 503, 23 L. ed. 377.
Yeatman v. New Orleans Savings Inst., 95 U. S. 764, 24 L. ed., 589.
Stewart v. Platt, 101 U. S., 731, 25 L. ed., 816.
Conner v. Long, 104, U. S., 244, 26 L. ed., 725.

It is submitted that the present Bankruptcy Act must be construed with reference to the purposes which it was enacted to accomplish. The object of the law is to destroy all preference and therefore it destroys liens acquired within the prohibited period, and distributes the assets which belong to the bankrupt, or which his general creditors may subject. But as to any assets which can not pass to the trustee, the general creditors have no interest therein, and an attachment which is a lien upon property which can not pass to the trustee does not operate either to prefer the attaching creditors or to defer the general creditor, and consequently is unaffected by the act. That Section 67f operates to annul an attachment in so far as the same may be a lien upon property which passes to the bankrupt's trustee under Sec. 70 of the act, is not questioned.

That said section operates to annul an attachment in so far as the same may have been levied upon property which could not pass to the bankrupt's trustee, is wholly inconsistent with the object and purpose of the act, that is, the distribution of the bankrupt's property without preference. By the very terms of the section, the lien, to be void, must be upon property which passes to the bankrupt's trustee. The language of the section is specific that the property "*Shall pass to the trustee as a part of the estate of the bankrupt*, unless, etc." The section annuls and revives certain liens on the bankrupt's property; it declares that certain liens against the bankrupt shall be made null and void, and then places thereon this qualification: "Unless the Court shall on due notice order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate."

The power given to the Court, of preserving such liens, is co-extensive with the destructive operation of the statute.

Only a lien which is made void by clause "F" can be preserved by the Court under clause "F." If the lien be not destroyed by operation of the statute, then there is no power given the Court to preserve it.

The rights of the trustee in bankruptcy have a composite character. He holds *the estate* of the bankrupt, and the *rights* of the bankrupt's creditors to and in that estate in trust, to apply the one for the purpose of the equalization of the other; he owns what the bankrupt owned at the date of the filing of the petition, and no more; he can do what the general creditors could do at the date of the filing of the petition, and no more. It must necessarily follow that when Section 67f annulled certain liens and provided that "The property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, *and shall pass to the trustee as a part of the estate of the bankrupt*, * * * " it had reference solely to property which could pass to the trustee under other provisions of the act.

Upon the question of what constitutes "a preference" as the term "preference" is used in the Bankruptcy Act, the opinion of the Circuit Court of Appeals of the Fourth Circuit is in direct conflict with the opinion of the Circuit Court of Appeals of the Eighth Circuit. The Court of Appeals of the Fourth Circuit (R., p. 34) said:

> "A primary object of the bankrupt law is to prevent preferences, and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality, and prevents preferences."

That the property attached in the case at bar was not estate of the bankrupt, Baird, which could pass to his trustee, is not questioned. Under the laws of Virginia, the pr perty attached at the time the attachment was levied, was the property of Baird, quoad the attaching creditor, because of the failure of the Roanoke Furnace Company to record the contract evidencing

its purchase. Forty-nine days prior to the filing of the petition, to wit, on November 7, 1900, the deed was recorded, and, as of that date, every vestige of interest, legal or equitable, passed from Baird, and subsequent to that date neither he nor anyone claiming under him, either had or could acquire any interest therein or lien thereon, because of his previous ownership. Baird had received the entire purchase price, and the attached property passed to the Roanoke Furnace Company, subject to the attachment lien, which is admitted to be valid quoad it.

It is submitted, that under the law and the facts of this case, a preference, if petitioner's attachment was not sequestered, but was left to it, would not be created, unless the court construed the word "preference," as used in the act, to mean *equal percentage of payment to each creditor, regardless of the fact that such payment would not be made out of the estate of the bankrupt.* Such a construction of a preference is in direct conflict with the construction given by the Circuit Court of Appeals of the Eighth Circuit, in the case of Swartz v. Fourth National Bank, 117 Federal Rep., page 1. In that case, at page 7, the Court said:

> "The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect *upon the equal distribution of the estate of the bankrupt,* not its effect upon the creditor, that determines the preference. * * *
>
> "Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others,* the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. It is *the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out the estate of the bankrupt,* and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

The decision of the Circuit Court of Appeals in this case becomes the law of this circuit, upon both the questions submitted, that is: (*a*) that a lien is prohibited by Sec. 67*f*, and that a trustee in bankruptcy should be subrogated to the rights of an attaching creditor in an attachment which is a lien upon property which can not pass to him as such trustee; (*b*) and, upon the question of "what constitutes a preference."

It is therefore respectfully urged that this Honorable Court should grant the writ of certiorari as prayed for in the petition, and on the following grounds:

(1) That the decision of the Circuit Court of Appeals of the Fourth Circuit in this case is in conflict with the decisions of the courts of last resort of Massachusetts, North Dakota, Georgia and Kansas, as hereinbefore shown; and also in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, and the questions involved should be passed upon by this Honorable Court in order to secure uniformity of decision.

(2) That the decision of said Court is subversive of the principle established by decisions of this Honorable Court, to wit, that the Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); that the prohibitions, restrictions and remedies therein provided for have reference solely and exclusively to the property of the bankrupt which passed, or should pass, to his trustee, and the rights become vested as of the date the petition was filed.

Hewitt v. Berlin Machine Works, 194 U. S. 302, 48 L. ed., page 988.

Pierie v. Chicago Title and Trust Co., 182 U. S., 449, 45 L. ed., 1178.

Hanover National Bank v. Moyses, 186 U. S. 185, 46 L. ed., 1118.

(3) That the decision of said Circuit Court of Appeals, that a lien is prohibited by Sec. 67*f*, and that a trustee in bankruptcy under said section should be subrogated to the rights of an attaching creditor in an attachment levied on property which was not the property of the bankrupt when the petition was filed, and which could not otherwise pass to his trustee, involves

a question of general importance, and especially in those States having registry laws.

It is asked that the writ prayed for be granted.

Respectfully submitted,

S. HAMILTON GRAVES,

Counsel for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

Receivers of Virginia Iron, Coal and Coke Company, et al.,
Petitioners,
v.
William H. Staake, Trustee of C. R. Baird & Company, Bankrupts,
Respondent.

To William H. Staake, Trustee of C. R. Baird & Company, Bankrupts:

You are hereby notified that on Monday, March 27th, A. D. 1905, at the motion hour, we will file a petition and enter a motion before the Supreme Court of the United States at Washington, D. C., to grant a writ of *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit to require said Court to certify to the Supreme Court of the United States for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the Receivers of the Virginia Iron, Coal and Coke Company, et al. were petitioners, and William H. Staake, Trustee for, etc., was respondent, being No. 531.

S. HAMILTON GRAVES,
of Counsel for—
Henry K. McHarg, and A. A. Phlegar,
Receivers of Virginia Iron, Coal and Coke Company,
Huff, Andrews & Moyler Company,
Nelson & Myers,
Smith & King,
Fairfax & Bell,
Central Manufacturing Company,
Standard Oil Company.

Notice of the foregoing motion is hereby accepted and other service waived this the 13th day of March, A. D. 1905.

WILLIAM H. STAAKE,
Trustee for, Etc.

By S. & M. GRIFFIN,
of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1904

RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY,

v. Petitioners

WILLIAM H. STAAKE, TRUSTEE OF

C. R. BAIRD & COMPANY, BANKRUPTS, Respondent

Petition for writ of certiorari, to the United States Circuit Court of Appeals for the Fourth Circuit, requiring it to certify to the Supreme Court of the United States, for its review and determination, the case of Receivers of Virginia Iron, Coal and Coke Company, Petitioners, versus William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent (No. 531), lately pending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Henry K. McHarg and A. A. Phlegar, Receivers of the Virginia Iron, Coal and Coke Company, a corporation; Huff, Andrews & Moyler Company, a corporation; A. M. Nelson and H. H. Myers, partners, trading as Nelson & Myers; Roy B. Smith and A. E. King, partners, trading as Smith & King; R. R. Fairfax and E. Lee Bell, partners, trading as Fairfax & Bell; the Central Manufacturing Company, a corporation; and the Standard Oil Company, a corporation, respectfully show:

I.

1st. That the questions of law involved in this cause are novel, of peculiar gravity and of vital importance in the general

administration of the Bankruptcy Act of 1898 (30 Stat. at L. 565 U. S. Comp. Stat. p. 3450); they arise upon the construction to be placed upon and the effect to be given Sec. 67f of that act, which is as follows:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry."

The questions, as presented, have not heretofore been directly passed upon so far as we can ascertain by any court, save in this cause, and in the abstract are:

(*a*) Is a lien void (in the absence of fraud) under Sec. 67f, *quoad* a bankrupt's trustee which is not to the prejudice of a bankrupt's creditors, and which is not upon and does not affect property belonging to the bankrupt, or property which his general creditors could have subjected as of the date the petition in bankruptcy was filed? In other words: Is an attachment which is in favor of a creditor of a bankrupt and which is a *valid lien* upon the property of a third party, void *quoad* the trustee of the bankrupt?

(*b*) Can the trustee of a bankrupt be subrogated to the rights of a creditor of a bankrupt, in an attachment which is

a lien only upon property, which was no part of the bankrupt's estate when the petition was filed, and which consequently could not pass to the trustee under Sec. 70 of the act?

(*c*) Can the trustee of a bankrupt cause to be declared void the lien of, and be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, but which is a valid lien *quoad* the owner of the attached property, when if such lien be enforced for the sole benefit of the attaching creditor it will work no diminution of the bankrupt's estate?

2nd. The question of what constitutes a *preference* as that term is used in the Bankruptcy Act of 1898, is also involved, and the construction given thereto by the Circuit Court of Appeals of the Fourth Circuit in this cause, is in direct conflict with the construction given thereto by the Circuit Court of Appeals of the Eighth Circuit. That a decision of this question by your Honorable Court is necessary to secure uniformity of decision in the administration of the Bankruptcy Act.

II.

The facts of this cause were agreed upon (R., pp. 13-18 inc.) and the Honorable Judge Morris, who wrote the opinion (R., p. 31) of the Circuit Court of Appeals, gives this summary:

"Chester R. Baird, trading as C. R. Baird & Co., on December 7, 1899, owned certain real estate in Virginia known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to wit, shares amounting to $500,000 of the capital stock of the said Roanoke Furnace Company.

"Under the contract of sale the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the Company was executed by Baird until November 5, 1900, when a proper deed was executed and

promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000, against Baird as a non-resident of Virginia, were issued at the instance of certain of his creditors (among whom were your petitioners), and were levied upon the Furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon (Code of Virginia, 1887, Sections 2463, 2464, 2465, 2472). Within four months of the levying of the attachments, to wit, on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

"Under orders of Court the property which was theretofore conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom, and all these claims were submitted to the determination of the court below by express consent of all the parties."

It further appears from the record in said cause, that the proceeds from the sale, when made by the officers of the Court, of the property conveyed by the deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company, were suffi-

cient to pay off and discharge all liens held by your petitioners.

It further appears from the record (page 3) that the amounts due your petitioners are as follows:

Receivers of Virginia Iron, Coal & Coke Co,	$24,778.83
Huff, Andrews & Moyler Company, . .	934.00
Nelson & Myers, ...	600.91
Smith & King, ...	1,050.00
Castner, Curran & Bullitt, ...	843.00
Fairfax & Bell, ...	640.00
Central Manufacturing Company, . . .	773.21
Standard Oil Company, ...	383.14

That subsequent to the sale of the attached property, and the signing of the agreed statement of facts, a petition was filed in the "In re Roanoke Furnace Company, Bankruptcy proceedings," in the District Court of the United States for the Western District of Virginia by William H. Staake, Trustee for C. R. Baird, wherein it was asked *inter alia*, that the liens acquired by your petitioners upon the property known as the "West End Furnace Property" (which was the property conveyed by deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company), be declared void as to him, and that they be preserved by the Court for his benefit as Trustee of C. R. Baird (R., p. 10). To this petition (R., pp. 19-20) a demurrer and answer was filed by your petitioners.

III.

Upon the hearing of the issues made by said petition, and the demurrer and answer thereto, the District Court overruled the demurrer and in effect decided and held that the attachment liens having been obtained through legal proceedings to which Baird was a party, he being insolvent, and within four months prior to the filing of the petition in Bankruptcy against him, were null and void under Sec. 67f of the Bankruptcy Act of 1898, and though the property attached was not the property of C. R. Baird when the bankrupt petition was filed, that power was given to the court by said section to enforce liens for the benefit of all the creditors, even though said liens might not be annulled under said Sec. 67f (R., p. 24); that if one creditor was paid in full

while other creditors received only a portion of their claims, a preference would be created, though the payment to the creditor who was paid in full was from a source other than the bankrupt's estate; that Sec. 67f is not confined to liens that create a preference, that if the attachment was held to be valid *quoad* Staake, Trustee, it would give a preference to your petitioners; the court then declared the liens void as to said trustee and ordered that they be preserved for the benefit of Baird's estate, and on January 14, 1904 (R., p. 27), ordered as follows: "That the rights acquired by the Attachment proceedings in the Hustings Court of the City of Roanoke by the attaching creditors" (to wit, your petitioners herein,) "be preserved for the benefit of the estate of the said C. R. Baird, Bankrupt, and that said petitioner, William H. Staake, Trustee of the said estate, be and he is hereby subrogated to said rights and authorized and empowered to enforce the attachment liens with like force and effect as the said attaching creditors might have done had not the Bankruptcy proceedings intervened."

IV.

On January 21, 1904, your petitioners filed in the United States Circuit Court of Appeals for the Fourth Circuit their petition, wherein they prayed the jurisdiction of said Court under the provisions of Sec. 24-b of said Bankruptcy Act, and that said Court superintend and revise in matter of law the proceedings and findings of the District Court, and that said Court revise, reverse and annul that portion of the decree of January 14, 1904, as is last above set forth (R., pp. 1-7).

That in said Circuit Court of Appeals said case was docketed as follows: "Receivers of Virginia Iron, Coal and Coke Company, Petitioners, v. William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent," and was entered as No. 531.

That said case was on May 12 and 13, 1904, argued and submitted in said Court; that on November 15, 1904, the said Circuit Court of Appeals rendered an opinion per Morris, District Judge,

concurred in by Goff, Circuit Judge (R., p. 31), and entered an order confirming the judgment of the District Court in the matter brought up for review; that District Judge Purnell, the other member of the Court sitting in the case, filed a dissenting opinion (R., p. 36). Your petitioners, on December 9, 1904 (R., p. 39), filed a petition in said Circuit Court of Appeals, wherein they prayed that a rehearing be granted to them upon the original record therein and upon the majority opinion rendered November 15, 1904, that the decree entered on that date be annulled, and that in lieu thereof a decree be entered in conformity with the prayer of their original petition. The prayer of the petition to rehear was denied by said Court by an order entered February 7, 1904 (R., p. 51).

That among the propositions of law decided and established by the majority opinion of the Circuit Court of Appeals, and by its affirming the opinion of the District Court, are these:

(1) That by virtue of Sec. 67f of the Bankruptcy Act of 1898, an attachment which was levied by a creditor of a bankrupt and became a valid lien under the laws of the Commonwealth of Virginia upon certain real estate, which could not pass to the Bankrupt's trustee, the ownership of and title to said real estate, both legal and equitable, being in a third party at the time the petition in bankruptcy was filed, is void *quoad* the bankrupt debtor's trustee; though said lien is admitted to be valid *quoad* the owner of the property attached.

The attached real estate having been sold to such third party by the bankrupt twelve months prior to the filing of the petition in bankruptcy, for a fair consideration, the entire purchase price paid without diminution because of said attachment, and a deed admittedly valid, executed, delivered and recorded forty-nine days prior to the filing of the petition in bankruptcy.

(2) That the trustee of a bankrupt, under and by virtue of Sec. 67f, shoud be subrogated to the rights of an attaching creditor in an attachment, *which is a lien upon the property of a third party;* property in which the bankrupt had neither ownership nor title, either legal or equitable, property which the bankrupt could not

have transferred, and which could not have been levied upon under judicial process against him within forty-nine days next prior to the filing of the petition in bankruptcy. In other words, that under said section, the trustee of a bankrupt is made the beneficial owner of a lien, which is upon property which could not pass to him as such trustee under Section 70 of the Bankruptcy Act. That such ownership is vested in him by virtue of the fact that the lien was procured by a creditor of the bankrupt, and not because the lien has any effect whatsoever upon the estate of the bankrupt.

(3) That under and by virtue of Section 67f, a trustee of a bankrupt should be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, and should enforce such lien for the benefit of all the creditors, when without such subrogation the lien would not be annulled or the property affected discharged therefrom under Sec. 67f. In other words, that the trustee should be subrogated to the rights of a creditor in an attachment, the lien of which is valid.

(4) That a preference within the meaning of the act is secured, if one creditor receives the full amount of his debt and another does not, even though the creditor who receives payment in full receives nothing from the estate of the bankrupt, but is paid entirely out of property which did not belong to the bankrupt, and which could not be subjected by or pass to his trustee. In other words, that unless each creditor receives equal percentage of payment, regardless of the source from which payment is secured, there is a preference.

A certified copy of the entire record of said case in the Circuit Court of Appeals is hereto annexed as a part of this application, in conformity with Rule 37 of this Honorable Court.

V.

Your petitioners most respectfully represent that the construction given Sec. 67f by said Circuit Court of Appeals of the Fourth Circuit is erroneous. Its effect is to extend the operation

of the Bankruptcy Act beyond the limits fixed by your Honorable Court, and to nullify a principle of law which heretofore has been recognized by the bench and bar of this country as irrevocably established, to wit: That the Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); that the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the property of the bankrupt which passes, or should pass to his trustee, and that rights become vested as of the date the petition is filed.

In the case of Hewitt v. Berlin Machine Works (194 U. S. 302, 48 Law Ed., p. 988), the court adopted and approved the language of the C. C. A. of the Second Circuit, and said:

> "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors, shall remain undisturbed."

In the case of Pierie v. Chicago Title and Trust Co. (182 U. S., 449: 45 Law. Ed. 1178), the Court used this language:

> "It is hardly necessary to assert that the object of a Bankruptcy Act, so far as creditors are concerned, is to secure equality of distribution among them of *the property of the Bankrupt.*"

Mr. Justice Catron, in the case re Klein, which is cited and approved in Hanover National Bank v. Moyses (186 U. S., 185: 46 Law Ed., 1118), in discussing the constitutional provision for a national bankrupt act, said:

> "Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: *To what limits is that jurisdiction restricted?* I hold it extends to all cases where the law causes to be distributed *the property* of the debtor among his creditors. This is its least limit."

Mr. Chief Justice Waite, in the case in re. Deckert, which case was cited and approved in Hanover National Bank v.

Moyses, supra, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

> "But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. * * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

That the property attached in the case at bar was not estate of the bankrupt which could pass to his trustee or which could have been reached by process 49 days next prior to the date the petition was filed against him is admitted. That the attachments, if enforced for the petitioners' benefit, will not be paid out of the estate of the bankrupt, Baird, or out of funds derived from a sale of his estate, is not questioned: yet, under these facts the Circuit Court of Appeals has held that the payment of petitioners' attachments to them would create a preference within the meaning of the act (R., p. 34).

In effect that a preference would be created unless an equal percentage of payment was made to each creditor of the bankrupt, regardless of the source from which the fund might be derived with which such payment might be made. Such a construction of a preference is not only erroneous, but is in direct conflict with the construction given by the Circuit Court of Appeals of the Eighth Circuit in the case of Swartz v. Fourth National Bank (117 Federal Rep., page 1). In that case, at page 7, the Court said:

> "The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect upon the *equal distribution of the estate of the bankrupt,*

not its effect upon the creditor, that determines the preference.

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others,* the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. *It is the relations of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt,* and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preference."

Your petitioners further represent, that in addition to the general importance of the propositions of law involved as presented by this petition, the decision is in conflict with those of the courts of last resort of Massachusetts, North Dakota, Kansas and Georgia; those courts having held, that the liens prohibited by § 67f are those upon property which passes to the trustee; (see brief p. 17) and that upon the question of "What constitutes a preference?" it is essential for the uniform construction and administration of the Bankruptcy Act in the Fourth and Eighth Circuits that the conflicting opinions should be harmonized and that this court of last resort should decide and determine which rule of construction should be adopted.

VI.

Your petitioners respectfully represent to this Honorable Court that no appeal is allowed them to this Court and that their only remedy is by petition for writ of certiorari under Section 25d of the Bankruptcy Act of 1898 (C. 541, § 25, 30 Stat. 553—U. S. Comp. Stat., p. 3432).

Wherefore, your petitioners respectfully pray, that the writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and

complete transcript of the record in all proceedings of the said Circuit Court of Appeals of the said case, entitled, "Receivers of Virginia Iron, Coal and Coke Company, Petitioners, v. William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent No. 531," to the end that the said cause may be reviewed and determined by this Court as provided by law; and that the judgment of the said Circuit Court of Appeals in said case be revised, reversed and annulled, and that this Honorable Court enter and cause to be entered such orders as may be necessary to secure to petitioners the full benefit of their attachment liens hereinbefore referred to, and to which they are clearly entitled. And may your petitioners have such other or further relief and remedy in the premises as to this Court may seem appropriate; and your petitioners will in duty bound ever pray.

S. HAMILTON GRAVES,
Counsel for Petitioners.

WM. G. ROBERTSON,
E. W. ROBERTSON,
ABRAM P. STAPLES,
of Counsel.

State of Virginia, }
City of Roanoke, } To wit:

S. Hamilton Graves, being duly sworn, says that he is of Counsel for the petitioners named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

S. HAMILTON GRAVES.

Subscribed and sworn to before me, this 16th day of March, A. D. 1905.

My commission as Notary Public expires on April 6th, A. D. 1907.

CHAS. I. LUNSFORD,

SEAL Notary Public for City of Roanoke, State of Virginia.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

Receivers of Virginia Iron, Coal and Coke Company, et al., Petitioners.

v.

William H. Staake, Trustee of C. R. Baird, Respondent.

Brief for Petitioners on Application for Writ of Certiorari.

As the petition for a writ of certiorari contains a concise statement of the most pertinent facts, it is not deemed necessary to give here more than a brief abstract.

In December, 1899, C. R. Baird was the owner of various properties located in Roanoke, Va., one of which was designated as the "West End Furnace Property."

That on December 7, 1899, he sold said last named property to the Roanoke Furnace Company, a corporation.

That he received the entire purchase price to which he was entitled.

That the Roanoke Furnace Company failed to immediately record, as required by the registry laws of Virginia, the written evidence of its purchase.

That in October, 1900, petitioners attached said "West End Furnace Property" for the several debts due to them by C. R. Baird.

That on November 7, 1900, the Roanoke Furnace Company

recorded a deed from C. R. Baird, which conveyed said property to it in fee.

That on December 24, 1900, a petition in bankruptcy was filed against C. R. Baird.

That William H. Staake was subsequently appointed the trustee for Baird's estate.

That on December 29, 1900, a petition in bankruptcy was filed against the Roanoke Furnace Company.

That in the "In re. Roanoke Furnace Company bankruptcy proceedings," Staake, the trustee of Baird, filed a petition and prayed to be subrogated to the rights of the petitioners in their attachments against the "West End Furnace Property."

It will not be contended that the "West End Furnace Property" could or should pass to Baird's trustee.

It will not be denied that all title, interest, and equity in said property did pass to the trustee of the Roanoke Furnace Company, subject to the attachment lien.

It is submitted that the proposition established in this case, That a lien which is upon property which can not pass to the trustee of the bankrupt is void, under Sec. 67f of the Bankruptcy Act, quoad such trustee, is a novel one, and is of such general importance that this Court should grant the writ prayed for, and determine this question. The Court, in its opinion (R., p. 33), in discussing said section, used this language:

> "It is contended however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter clause of 67f can have reference only to liens on property, which, if the liens were annulled would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the most obvious meaning of the words. The wording seems clearly to contemplate *that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy*, and it would appear

that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee."

The proposition involved in the above quotation, to wit, that a creditor, by reason of his being such, may secure a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, is a pioneer. It imposes a penalty upon a creditor of the bankrupt, by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party may have had upon the estate of the bankrupt. It brings into the estate as an asset the proceeds from a lien, not upon that estate but upon property which no process from any court, state or federal, could have reached at the instance of the bankrupt or his creditors, as of the date the petition was filed. It, in effect and in fact, in the case at bar, creates an asset. After a most careful search, we have been unable to find any decision of any court, holding that the Bankrupt Act avoided a lien on any property whatsoever other than that of the bankrupt which passed to his trustee. It has not heretofore been contended that a bankrupt court could take jurisdiction of a creditor of a bankrupt, for the sole reason that he was such. The jurisdiction of the bankrupt court, aside from the question of discharge, has heretofore been confined to the administration of the bankrupt's estate which passed to the trustee. So far as we know, this is the first case in which it has been held that the liens prohibited by Sec. 67f were other than those upon property which passed to the trustee of the bankrupt. The contrary has been held by the courts of last resort in Massachusetts, North Dakota, Georgia, and Kansas.

In Powers Dry Goods Co. v. Nelson (10 N. D., 580), the Court said:

> "Section 67f after declaring that all attachments levied within four months prior to the filing of the petition shall be null and void, and discharged and released, declares that the effect of such a discharge shall be to pass the property covered by the lien "*to the trustee as a part of the estate of the bankrupt.*" It is entirely plain that this section does not refer to

liens upon property which the court does not undertake to administer and over which it has no jurisdiction. * * * If defendant's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property, is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; * * * no such absurd construction can be sustained."

In Frazee v. Nelson (61 N. E., R., p. 40) the Supreme Judicial Court of Massachusetts held:

"The effect of Section 67f of the U. S. Bankruptcy Act of July 1, 1898, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy, and those claiming under him, *so that the property may pass to and be distributed by him among the creditors of the bankrupt.*"

In McKenny v. Cheney (Vol. 11, A. B. R., p. 54) the Supreme Court of Georgia cites with approval the construction given Sec. 67f by the Supreme Courts of Massachusetts and North Dakota. And also cites with approval, the case of Robertson v. Wilson (15 Kansas, 595). And says:

"In the Kansas case the Court said:
'As the bankrupt court gets no jurisdiction of the exempt property, it would seem that it should take none over any specific liens upon such property.' The lien in that case was that of an attachment levied within four months prior to the adjudication in bankruptcy. It was held that, as the homestead did not pass to the assignee in bankruptcy, the bankruptcy proceedings did not dissolve the attachment."

The object of the Bankruptcy Act, the fundamental principle upon which it is founded so far as creditors are concerned (other than the subject of discharge), is to take possession of, through the medium of a trustee, *the property* of the insolvent debtor, convert same into money and distribute it among the general creditors without preference. For that purpose, and that alone, the Bankruptcy Act declares void certain liens ac-

quired within a specified time upon the property of the bankrupt,

Mayer v. Hellman, 91 U. S. 503, 23 L. ed., 377.
Yeatman v. New Orleans Savings Inst., 95 U. S. 764, 24 L. ed., 589.
Stewart v. Platt, 101 U. S., 731, 25 L. ed., 816.
Conner v. Long, 104, U. S., 244, 26 L. ed., 725.

It is submitted that the present Bankruptcy Act must be construed with reference to the purposes which it was enacted to accomplish. The object of the law is to destroy all preference and therefore it destroys liens acquired within the prohibited period, and distributes the assets which belong to the bankrupt, or which his general creditors may subject. But as to any assets which can not pass to the trustee, the general creditors have no interest therein, and an attachment which is a lien upon property which can not pass to the trustee does not operate either to prefer the attaching creditor or to defer the general creditor, and consequently is unaffected by the act. That Section 67f operates to annul an attachment in so far as the same may be a lien upon property which passes to the bankrupt's trustee under Sec. 70 of the act, is not questioned.

That said section operates to annul an attachment in so far as the same may have been levied upon property which could not pass to the bankrupt's trustee, is wholly inconsistent with the object and purpose of the act, that is, the distribution of the bankrupt's property without preference. By the very terms of the section, the lien, to be void, must be upon property which passes to the bankrupt's trustee. The language of the section is specific that the property "*Shall pass to the trustee as a part of the estate of the bankrupt*, unless, etc." The section annuls and revives certain liens on the bankrupt's property; it declares that certain liens against the bankrupt shall be made null and void, and then places thereon this qualification: "Unless the Court shall on due notice order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate."

The power given to the Court, of preserving such liens, is co-extensive with the destructive operation of the statute.

Only a lien which is made void by clause "F" can be preserved by the Court under clause "F." If the lien be not destroyed by operation of the statute, then there is no power given the Court to preserve it.

The rights of the trustee in bankruptcy have a composite character. He holds *the estate* of the bankrupt, and the *rights* of the bankrupt's creditors to and in that estate in trust, to apply the one for the purpose of the equalization of the other; he owns what the bankrupt owned at the date of the filing of the petition, and no more; he can do what the general creditors could do at the date of the filing of the petition, and no more. It must necessarily follow that when Section 67f annulled certain liens and provided that "The property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, *and shall pass to the trustee as a part of the estate of the bankrupt*, * * * " it had reference solely to property which could pass to the trustee under other provisions of the act.

Upon the question of what constitutes "a preference" as the term "preference" is used in the Bankruptcy Act, the opinion of the Circuit Court of Appeals of the Fourth Circuit is in direct conflict with the opinion of the Circuit Court of Appeals of the Eighth Circuit. The Court of Appeals of the Fourth Circuit (R., p. 34) said:

> "A primary object of the bankrupt law is to prevent preferences, and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality, and prevents preferences."

That the property attached in the case at bar was not estate of the bankrupt, Baird, which could pass to his trustee, is not questioned. Under the laws of Virginia, the property attached at the time the attachment was levied, was the property of Baird, quoad the attaching creditor, because of the failure of the Roanoke Furnace Company to record the contract evidencing

its purchase. Forty-nine days prior to the filing of the petition, to wit, on November 7, 1900, the deed was recorded, and, as of that date, every vestige of interest, legal or equitable, passed from Baird, and subsequent to that date neither he nor anyone claiming under him, either had or could acquire any interest therein or lien thereon, because of his previous ownership. Baird had received the entire purchase price, and the attached property passed to the Roanoke Furnace Company, subject to the attachment liens, which are admitted to be valid quoad it.

It is submitted, that under the law and the facts of this case, a preference, if petitioners' attachments were not sequestered, but were left to them, would not be created, unless the court construed the word "preference," as used in the act, to mean *equal percentage of payment to each creditor, regardless of the fact that such payment would not be made out of the estate of the bankrupt.* Such a construction of a preference is in direct conflict with the construction given by the Circuit Court of Appeals of the Eighth Circuit, in the case of Swartz v. Fourth National Bank, 117 Federal Rep., page 1. In that case, at page 7, the Court said:

> "The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect *upon the equal distribution of the estate of the bankrupt*, not its effect upon the creditors, that determines the preference. * * *
>
> "Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others*, the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. It is *the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt*, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

The decision of the Circuit Court of Appeals in this case becomes the law of this circuit, upon both the questions submitted, that is: (*a*) that a lien is prohibited by Sec. 67f, and that a trustee in bankruptcy should be subrogated to the rights of an attaching creditor in an attachment which is a lien upon property which can not pass to him as such trustee; (*b*) and, upon the question of "what constitutes a preference."

It is therefore respectfully urged that this Honorable Court should grant the writ of certiorari as prayed for in the petition, and on the following grounds:

(1) That the decision of the Circuit Court of Appeals of the Fourth Circuit in this case is in conflict with the decisions of the courts of last resort of Massachusetts, North Dakota, Georgia and Kansas, as hereinbefore shown; and also in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, and the questions involved should be passed upon by this Honorable Court in order to secure uniformity of decision.

(2) That the decision of said Court is subversive of the principle established by decisions of this Honorable Court, to wit, that the Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); that the prohibitions, restrictions and remedies therein provided for have reference solely and exclusively to the property of the bankrupt which passed, or should pass, to his trustee, and that rights become vested as of the date the petition was filed.

Hewitt v. Berlin Machine Works, 194 U. S. 302, 48 L. ed., page 988.
Pierie v. Chicago Title and Trust Co., 182 U. S., 449, 45 L. ed., page 1178.
Hanover National Bank v. Moyses, 186 U. S. 185, 46 L. ed., page 1118.

(3) That the decision of said Circuit Court of Appeals, that a lien is prohibited by Sec. 67f, and that a trustee in bankruptcy under said section should be subrogated to the rights of an attaching creditor in an attachment levied on property which was not the property of the bankrupt when the petition was filed, and which could not otherwise pass to his trustee, involves

a question of general importance, and especially in those States having registry laws.

It is asked that the writ prayed for be granted.

Respectfully submitted,

S. HAMILTON GRAVES,
Counsel for Petitioners.

WM. G. ROBERTSON,
E. W. ROBERSTON,
ABRAM P. STAPLES,
of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1904

FIRST NATIONAL BANK OF BALTIMORE, MD., Petitioner

v.

WM. H. STAAKE, TRUSTEE FOR
C. R. BAIRD & COMPANY, BANKRUPTS, Respondent

Brief of Petitioner in Reply to Brief Filed by Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel for respondent in their reply brief in substance assign two reasons why the writ prayed for should not be granted:

1st. That it was admitted in the petition that the case at bar was the only case of the kind which had arisen.

2nd. That the conflict of opinion between the Circuit Courts of Appeal for the Fourth and Eighth Circuits was upon an incidental question, if there was any conflict at all.

On Page 1 of their brief, referring to the petitions filed in Numbers 583 and 584, it is said:

> "Both admit these are the only cases of the kind which have arisen under the Bankruptcy Act.
> * * * * * * * "

In this statement they are in error, as even a casual reading of the petitions will show. Two propositions were submitted in

support of the prayer for the writ. The first was that the questions of law involved were novel, of peculiar gravity, and of vital importance in the general administration of the Bankruptcy Act of 1898. The second was, conflict of decision.

As to the first proposition, on Page 4 of petition, it was said:

> "The questions, as presented, have not heretofore been directly passed upon. * * * "

It is presumed that this language was the supposed admission upon which counsel relied. The question, as presented—to wit: whether or not an attachment which was a valid lien upon property which *could not* pass to the trustee of a bankrupt, *is void quoad such trustee*, under Section 67-f, and that he should be subrogated to the rights of an attaching creditor—so far as we know, has not been directly passed upon. The principle, however, involved, is whether or not the liens which are made void by Section 67-f are confined to those upon property which passes to the trustee. This question has been passed upon in controversies between the lienor and the bankrupt, but not between the lienor and the trustee of the bankrupt.

The Court is respectfully asked to bear in mind, that the property attached in the case at bar *can not* pass to Baird's trustee, if the lien be declared void and cancelled.

The Court of Appeals in the case at bar, when construing Section 67-f, said:

> "It is contended, however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of clause 67-f can have reference only to liens on property which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property, which would not,

if unaffected, pass to the trustee in bankruptcy.
* * * * * * * * "

The construction thus given and the proposition established, is novel and of general importance in the administration of the Bankruptcy Act, and especially in those States having registry laws.

The fact that the company, the property of which was attached, was subsequently adjudged a bankrupt, is a mere incident, and consequently neither did nor could influence the Court in arriving at the construction placed upon the section in question. The construction given, and the principle established, must, so long as that opinion remains unreversed, be the established rule of construction throughout the Fourth Circuit. The inevitable consequence is, that in every instance, in which a creditor secures a lien by judgment or attachment upon property, within four months of the filing of a petition in bankruptcy, by or against the debtor, because of the failure of the purchaser to record the evidence of his purchase, though the debtor may have received, as in the case at bar, every dollar of the purchase money, the lien is made void by the statute, and the property either remains in the hands of the purchaser, discharged from the lien, or, at the option of the Court, is preserved for the bankrupt's estate. If preserved, the trustee must then go into the Court in which the lien was secured and enforce it, since it is upon property over which the Bankrupt Court has no jurisdiction.

If a deed, as in the case at bar, had been recorded subsequent to the attachment, but prior to the filing of the petition, this legal absurdity is presented: A trustee who represents the bankrupt and the bankrupt's general creditors enforcing a lien against the covenants of the bankrupt in an instrument under seal, and upon property in which the bankrupt had no interest and which could not have been subjected by his general creditors prior to the filing of the petition.

The principle established in this case—to wit, that the liens made void by Section 67-f are not confined to those upon property

which passes to the trustee—is in direct conflict with the decisions of the Supreme Courts of North Dakota, Massachusetts, and Georgia. (See opening Brief, Pages 17 and 18.)

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> "Aside from the authority cited, however, we think that the language of the statute offers ample warrant for the ruling here made.
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> "The section in question provides simply that the effect of the discharge of such liens as are obtained within four months prior to the filing of a petition in bankruptcy shall be to pass the property against which the lien is held, 'to the trustee, as a part of the estate of the bankrupt.' So it seems that the effect of this language is clearly to exclude liens upon property which the bankrupt court does not undertake to administer, and over which it has no jurisdiction."

The second reason assigned by counsel was, that the conflict of opinion between the Circuit Courts of Appeal of the Fourth and Eighth Circuits, upon the question of what constitutes a preference, was upon an incidental question, and, further, that there was no conflict, and adds:

> "It will be observed, therefore, that neither in the decision of the District Court nor of the Circuit Court of Appeals, was it asserted that the liens were void because preferential, the result being reached because of the express language of Section 67-f of the Act."

How counsel can in good faith make this contention, we are not able to understand, except upon the hypothesis that the brief was prepared by counsel not before engaged in the case, and consequently not familiar with the record or opinion.

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tition in bankruptcy against him, were null and void under Section 67-f of the Bankruptcy Act of 1898, *so far as they would give a preference to the attaching creditors,* * * * * "

The question of what constitutes a preference, was one of the main points of the cases, and to it the argument was chiefly directed, and this question was directly passed upon by the Court in its opinion (see quotation and comments in our opening Brief, Pages 20 and 21.)

If the Court in its opinion had held as our brothers contend, that the liens in question were not void because preferential, but solely because of the express language of 67-f of the Act, then its opinion would have been in direct conflict with that of the Supreme Court of Rhode Island. That court, in the case of Doyle v. Heath (22 R. I., 213, 47 Atl. 213), was asked to annul a certain judgment under the section in question, but when the objection was made that the judgment could not be affected by the Act, because the lien thereof antedated the four months' limit, the Court stated that it would construe the language of clause "F" in the light of the purpose to be accomplished by the act, and would extend its operation no further than was necessary to accomplish its purpose, preventing a *preference*. ~~tween creditors having an interest in the property~~.

Without discussing what would be the effect of giving a literal interpretation to the language of clause "F," Judge Blodgett said:

> "We decline to adopt such a construction of the language of the Act, and we construe the words 'all judgments,' to be qualified and defined by their context, and to be limited to the lien or preference created by such a judgment. Such a construction seems to us to be in exact accord with the spirit and scope of the Act in general, as well as of Section 67—that no *preference* should be created within a specified time of filing the petition in bankruptcy."

Counsel in their brief (p. 3) say: "The Circuit Court of Appeals further held that it was only because the property attached by the creditor remained *quoad the attaching creditor* the

property of the bankrupt that the attachments were liens at all." We do not understand the purpose of this statement, unless it was intended to emphasize the idea of a literal gratification of the words of the section in question. That the property when attached was the property of Baird *quoad the attaching creditor* is not questioned: but it will not be contended that it was in any sense Baird's property forty-nine days next prior to the date the petition was filed. Since, on November 7th, 1900, a valid deed was recorded. That it was Baird's property *quoad* the attaching creditor subsequent to December 7th, 1899, the date of the sale by him, is a legal fiction created by the Registry Statutes of Virginia.

Before preparing the petition in this cause we were fully apprised by the previous decisions of this Honorable Court, that it exercised sparingly and with great care its power to issue the writ of certiorari. But that such power would be exercised when the circumstances of the case were such as to make it necessary, that some question of general importance might be finally determined, or to secure uniformity of decision between two or more Circuit Courts of Appeal, or between a Circuit Court of Appeals and a court of last resort of a State.

Upon the subject of Bankruptcies there is a constitutional requirement of uniformity—the laws passed on the subject must be uniform throughout the United States. It is submitted that this Court, the Court of the Nation, should see that there is uniformity of construction; otherwise, the uniformity of enactment becomes a nullity.

The nature and object of the Act is such that any difference of opinion between Courts of Last Resort, when construing its primary provisions, presents a question of such general importance that this Court should exercise its power, hear and determine the question.

It is earnestly submitted, that with the Courts of Last Resort of Massachusetts, North Dakota, and Georgia, holding that the liens made void by Section 67-f were confined to those upon property of the bankrupt *which passed to his trustee;* with

the Circuit Court of Appeals of the Fourth Circuit holding the converse; with the Circuit Court of Appeals of the Eighth Circuit holding the test of a preference to be—whether or not a transfer or payment will have the effect to pay on one claim a larger dividend, *out of the estate of the bankrupt*, than that estate will pay on other claims of the same class, that is, *making the effect of the payment upon the equal distribution of the estate of the bankrupt* the test, and not the effect such payment might have upon the creditor; and with the Circuit Court of Appeals of the Fourth Circuit holding the test of a preference to be—whether or not equal percentage of payment is made to each creditor, regardless of the fact that such payment *would not be made out of the estate of the bankrupt*, does present such a serious conflict that this Court should grant the writ of certiorari as prayed for.

S. HAMILTON GRAVES,
Counsel for Petitioner.

FILE COPY.

No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY, ET AL.,

PETITIONERS,

v.

WILLIAM H. STAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS,

RESPONDENT.

Reply Brief for Petitioners, on Motion for Writ of Certiorari.

S. HAMILTON GRAVES,
WM. G. ROBERTSON,
E. W. ROBERTSON,
ABRAM P. STAPLES,
Counsel for Petitioners.

In the Supreme Court of the United States

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RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY, Petitioners

v.

WM. H. STAAKE, TRUSTEE FOR C. R. BAIRD & COMPANY, BANKRUPTS, Respondent

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Brief of Petitioners in Reply to Brief Filed by Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel for respondent in their reply brief in substance assign two reasons why the writ prayed for should not be granted:

1st. That it was admitted in the petition that the case at bar was the only case of the kind which had arisen.

2nd. That the conflict of opinion between the Circuit Courts of Appeal for the Fourth and Eighth Circuits was upon an incidental question, if there was any conflict at all.

On Page 1 of their brief, referring to the petitions filed in Numbers 583 and 584, it is said:

> "Both admit these are the only cases of the kind which have arisen under the Bankruptcy Act.
> * * * * * * * "

In this statement they are in error, as even a casual reading of the petitions will show. Two propositions were submitted in

support of the prayer for the writ. The first was that the questions of law involved were novel, of peculiar gravity, and of vital importance in the general administration of the Bankruptcy Act of 1898. The second was, conflict of decision.

As to the first proposition, on Page 4 of petition, it was said:

> "The questions, as presented, have not heretofore been directly passed upon. * * * "

It is presumed that this language was the supposed admission upon which counsel relied. The question, as presented—to wit: whether or not an attachment which was a valid lien upon property which *could not* pass to the trustee of a bankrupt, *is void quoad such trustee*, under Section 67-f, and that he should be subrogated to the rights of an attaching creditor—so far as we know, has not been directly passed upon. The principle, however, involved, is whether or not the liens which are made void by Section 67-f are confined to those upon property which passes to the trustee. This question has been passed upon in controversies between the lienor and the bankrupt, but not between the lienor and the trustee of the bankrupt.

The Court is respectfully asked to bear in mind, that the property attached in the case at bar *can not* pass to Baird's trustee, if the lien be declared void and cancelled.

The Court of Appeals in the case at bar, when construing Section 67-f, said:

> "It is contended, however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of clause 67-f can have reference only to liens on property which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property, which would not,

if unaffected, pass to the trustee in bankruptcy.

* * * * * * * * "

The construction thus given and the proposition established, is novel and of general importance in the administration of the Bankruptcy Act, and especially in those States having registry laws.

The fact that the company, the property of which was attached, was subsequently adjudged a bankrupt, is a mere incident, and consequently neither did nor could influence the Court in arriving at the construction placed upon the section in question. The construction given, and the principle established, must, so long as that opinion remains unreversed, be the established rule of construction throughout the Fourth Circuit. The inevitable consequence is, that in every instance, in which a creditor secures a lien by judgment or attachment upon property, within four months of the filing of a petition in bankruptcy, by or against the debtor, because of the failure of the purchaser to record the evidence of his purchase, though the debtor may have received, as in the case at bar, every dollar of the purchase money, the lien is made void by the statute, and the property either remains in the hands of the purchaser, discharged from the lien, or, at the opinion of the Court, the lien is preserved for the bankrupt's estate. If preserved, the trustee must then go into the Court in which the lien was secured and enforce it, since it is upon property over which the Bankrupt Court has no jurisdiction.

If a deed, as in the case at bar, had been recorded subsequent to the attachment, but prior to the filing of the petition, this legal absurdity is presented: A trustee who represents the bankrupt and the bankrupt's general creditors enforcing a lien against the covenants of the bankrupt in an instrument under seal, and upon property in which the bankrupt had no interest and which could not have been subjected by his general creditors prior to the filing of the petition.

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S. HAMILTON GRAVES,
Counsel for Petitioners.

WM. G. ROBERTSON,
E. W. ROBERTSON,
ABRAM P. STAPLES,
of Counsel.

FILE COPY

BRIEF FOR PETITIONER.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

S. HAMILTON GRAVES,
Counsel for First National Bank of Baltimore, Petitioner.

(19,683.)

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BRIEF FOR PETITIONER

TO THE HONORABLE, THE CHIEF JUSTICE AND AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF THE CASE.

The facts of this case were agreed upon (R. pp. 8-12 inc.) and the Honorable Judge Morris, who wrote the majority opinion (R., p. 26) of the Circuit Court of Appeals, gives this summary:

"Chester R. Baird, trading as C. R. Baird & Co.,

on December 7, 1899, owned certain real estate in Virginia known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to-wit: shares amounting to $500,000.00 of the capital stock of the said Roanoke Furnace Company.

"Under the contract of sale the Roanoke Furnace Company took immediate possession in December,1899, of the property so purchased, but no deed to the Company was executed by Baird until November 5, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000.00 against Baird as a non-resident of Virginia, were issued at the instance of certain of his creditors (one of which was the First National Bank of Baltimore, Maryland), and were levied upon the Furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon (Code of Virginia, 1887, Sections 2463, 2464, 2465, 2472). Within four months of the levying of the attachments, to-wit: on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of

the bankrupt estate of C. R. Baird and on June 29, 1901, John N. M. Shimer was appointed trustee of the estate of the Roanoke Furnace Company.

"Under orders of Court the property which was theretofore conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom, and all these claims were submitted to the determination of the Court below by express consent of all the parties."

The agreed facts further show (R., p. 11).

"That the proceeds from the sale when made by the officers of the Court, of the property conveyed by the deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company, were not only sufficient to pay off and discharge all liens thereon prior to that of the First National Bank of Baltimore, but were also sufficient to pay off and discharge the lien of said bank, as evidenced by said attachment, principal, interest and costs.

"That a sufficient part of the proceeds of sale from said property to pay off the amount due the First National Bank of Baltimore is now in the hands of said trustees under the last decrees aforesaid.

"That the balance due said Bank, exclusive of the costs incurred in the Hustings Court, is $8,152.06 with interest thereon at 6 per cent. from the 11th day of November, 1902."

This was also agreed (R., p. 10): "That the deed of November 5, 1900, from said Baird to the Roanoke Furnace Co., was a valid conveyance to a purchaser in good faith for a fair consideration, and was not affected by the Bankruptcy proceedings hereinbefore mentioned.

"That subsequent to the sale of the attached property, and the signing of the agreed statement of facts, a petition was filed in the "In re Roanoke Furnace

Company, Bankruptcy proceedings," in the District Court of the United States for the Western District of Virginia by William H. Staake, Trustee for C. R. Baird, wherein it was asked *inter alia,* that the lien acquired by your petitioner upon the property known as the "West End Furnace property" (which was the property conveyed by deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company), be declared void as to him, and that it be preserved by the Court for his benefit as trustee of C. R. Baird (R., p. 6); to this petition (R., pp. 13-15) a demurrer and answer was filed by the First National Bank of Baltimore."

Upon the hearing of the issues made by said petition, and the demurrer and answer thereto, the District Court overruled the demurrer and in effect decided and held that the attachment lien having been obtained through legal proceedings to which Baird was a party, he being insolvent, and within four months prior to the filing of the petition in Bankruptcy against him, was null and void under Sec. 67f of the Bankruptcy Act of 1898, and though the property attached was not the property of C. R. Baird when the bankrupt petition was filed, that power was given to the Court by said section to enforce liens for the benefit of all the creditors, even though said liens might not be annulled under said Sec. 67f (R., p. 19); that if one creditor was paid in full while other creditors received only a portion of their claims, a preference would be created, though the payment to the creditor who was paid in full was from a source other than the bankrupt's estate; that Sec. 67f is not confined to liens that create a preference, that if the attachment was held to be valid *quoad,* Staake, Trustee, it would give a preference to your petitioner; the Court then declared the lien void as to said trustee and ordered that it be preserved for the benefit of Baird's estate, and on January 14, 1904 (R., p. 21), ordered as follows:

> "That the rights acquired by the attachment proceedings in the Hustings Court of the City of Roanoke by the attaching creditor, to wit, the First

National Bank of Baltimore, Maryland, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, William H. Staake, trustee of the said estate, be and he is hereby subrogated to said rights and authorized and empowered to enforce the attachment lien with like force and effect as the said attaching creditor might have done had not the bankruptcy proceedings intervened."

On January 22, 1904, your petitioner filed in the United States Circuit Court for the Fourth Circuit, its petition, wherein it prayed the jurisdiction of said Court under the provisions of Sec. 24b of said Bankruptcy Act, and that said Court superintend and revise in matter of law the proceedings and findings of the District Court, and that said Court revise, reverse and annul that portion of the decree of January 14, 1904, as is last above set forth (R., 1-4).

That in said Circuit Court of Appeals said case was docketed as follows:

"First National Bank of Baltimore, Petitioner, vs. William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, et el., Respondents," and was entered as No. 532.

That said case was on May 12 and 13, 1904, argued and submitted in said Court; that on November 15, 1904, the said Circuit Court of Appeals rendered an opinion per Morris, District Judge, concurred in by Goff, Circuit Judge (R., p. 31) and entered an order affirming the judgment of the District Court in the matter brought up for review; that District Judge Purnell, the other member of the Court sitting in the case, filed a dissenting opinion (R., p. 30). Your Petitioner on December 9, 1904, (R., pp. 31-38), filed a petition in said Circuit Court of Appeals wherein it prayed that a rehearing be granted to it upon the original record therein and upon the majority opinion rendered November 15, 1904, that the decree entered on that date be an-

nulled, and that in lieu thereof a decree be entered in conformity with the prayer of the original petition. The prayer of the petition to rehear was denied by said Court by an order entered February 7, 1904 (R., p. 39).

The case is before this Court on a writ of *certiorari*.

ABSTRACT OF PERTINENT FACTS.

In December, 1899, C. R. Baird was the owner of various parcels of real estate located in Roanoke, Virginia, one parcel of which was designated as the "West End Furnace Property."

That on December 7, 1899, (R., p. 10, §8), he sold said last named property to the Roanoke Furnace Company, a corporation.

That he received (R., p. 12, §10) the entire purchase price to which he was entitled.

That the Roanoke Furnace Company (R., p. 10, § 8) failed to immediately record, as required by the Registry Laws of Virginia, the written evidence of its purchase.

That on October 26, 1900 (R., p. 8, §1), petitioner attached said "West End Furnace Property" for a debt due to it by C. R. Baird.

That on November 7, 1900, (R., p. 10, §8), the Roanoke Furrace Company recorded a deed from C. R. Baird, which conveyed said property to it in fee.

That on December 24, 1900 (R., p. 9, §2), a petition in bankruptcy was filed against C. R. Baird.

That William H. Staake was subsequently appointed the trustee for Baird's estate.

That on December 29, 1900 (R., p. 9, §5), a petition in bankruptcy was filed against the Roanoke Furnace Company.

That in the, In. Re. Roanoke Furnace Company bankruptcy proceedings, Staake, the trustee of Baird, filed a petition and prayed to be subrogated to the rights of the Bank in its attachment against the "West End Furnace Property."

It will not be contended that the "West End Furnace Property" could or should pass to Baird's trustee.

It will not be denied that all title, interest, and equity in said property did pass to the trustee of the Roanoke Furnace Company, subject to the attachment lien.

LEGAL QUESTIONS INVOLVED.

1. Should the trustee of a bankrupt be subrogated to the rights of an attaching creditor, in an attachment which was procured within four months of the filing of the bankruptcy petition, upon property in which the bankrupt had no beneficial interest, and became a lien, only by reason of the failure of the owner of the beneficial interest to comply with the registry statues of Virginia, and the legal title which was in said bankrupt having been conveyed by him by a valid conveyance subsequent to the attachment, but forty-nine days prior to the filing of the petition against him?

2. Can a creditor of a bankrupt solely by reason of his being such creditor, obtain a prohibited lien against property which would not pass to the trustee in bankruptcy, if unaffected by the lien?

3. Does a creditor of a bankrupt secure a ***preference*** by receiving his debt in full, when other creditors of the bankrupt receive only a percentage on their debts, when the creditor receiving the payment in full ***does not receive*** such payment out of the bankrupt's estate, and when such payment works no diminution of that estate?

II

SPECIFICATION OF ERRORS RELIED UPON.

(1) That the District Court erred when it decreed (R., p. 21.), that the lien acquired by Petitioner in the Attachment Proceedings in the Hustings Court of the City of Roanoke was void as to it, but, should be preserved for the benefit of said Staake, Trustee, and in

directing that he be subrogated to the rights of Petitioner under said attachment.

(2) That the Circuit Court of Appeals erred (R., p. 31) when it affirmed said Decree of the District Court.

The propositions of law decided and established by the majority opinion of the Circuit Court of Appeals, and by its affirming the opinion of the District Court, which it is submitted are erroneous, are these:

(1) That by virtue of Sec. 67f of the Bankruptcy Act of 1898, an attachment which was levied by a creditor of a Bankrupt and became a valid lien under the laws of the Commonwealth of Virginia upon certain real estate, which could not pass to the Bankrupt's trustee, the ownership of and title to said real estate, both legal and equitable, being in a third party at the time the petition in bankruptcy was filed, is void *quoad* the bankrupt debtor's trustee; though said lien is admitted to be valid *quoad* the owner of the property attached.

The attached real estate having been sold to such third party by the bankrupt twelve months prior to the filing of the petition in bankruptcy, for a fair consideration, the entire purchase price paid without diminution because of said attachment, and a deed admittedly valid, executed, delivered and recorded forty-nine days prior to the filing of the petition in bankruptcy.

(2) That the trustee of a bankrupt, under and by virtue of Sec. 67f, should be subrogated to the rights of an attaching creditor in an attachment, *which is a lien upon the property of a third party;* property in which the bankrupt had neither ownership or title, either legal or equitable, property which the bankrupt could not have transferred, and which could not have been levied upon under judicial process against him within forty-nine days next prior to the filing of the petition in bankruptcy. In other words, that under said section, the trustee of a bankrupt is made the beneficial owner of a lien, which is upon property which

could not pass to him as such trustee under Sec. 70 of the Bankruptcy Act. That such ownership is vested in him by virtue of the fact that the lien was procured by a *creditor* of the bankrupt, and *not* because the lien has any affect whatsoever upon *the estate* of the bankrupt.

(3) That under and by virtue of Sec.67f, a trustee of a bankrupt should be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, and should enforce such lien for the benefit of all the creditors, when without such subrogation the lien would not be annulled or the property affected discharged therefrom under Sec. 67f. In other words, that the trustee should be subrogated to the rights of a creditor in an attachment, the lien of which is valid.

(4) That a preference within the meaning of the act is secured, if one creditor receives the full amount of his debt and another does not, even though the creditor who receives payment in full receives nothing from the estate of the bankrupt, but is paid entirely out of property which did not belong to the bankrupt, and which could not be subjected by or pass to his trustee. In other words, that unless each creditor receives equal percentage of payment, regardless of the source from which payment is secured, there is preference.

ARGUMENT:

The primary question of this case, (as I construe Thompson vs. Fairbank, 196 U.S., 516) is, what was the status under the laws of Virginia of the property upon which the attachment was levied?

In December, 1899, C. R. Baird was its sole owner.

On December 7th, 1899, he (Baird) sold it to the Roanoke Furnace Company and received the entire consideration to which he was entitled (R. p. 10, §§ 8 & 9). Thereupon a trust was created, the Roanoke Furnace Company being the real beneficial owner, and Baird a mere trustee of the naked legal title for its benefit. Subsequent to that time whatever advantage

may have accrued to the property was the purchaser's gain. What loss may have fallen on the estate is the loss of the purchaser.

The illustration of the general doctrine as given by Mr. Pomeroy (Pomeroy's Eq. Jur., 2d Ed., Vol. 2, p. 1435, Sec. 981) is in these words:

> "Whenever an owner agreed for a valuable consideration to sell his estate, although there was no conveyance, and there were no words of inheritance in the contract, equity declared that a use was created in favor of the vendee, by means of the consideration, and that the vendor held the legal title as his trustee."

In Virginia the consideration is the essential fact which determines the real beneficial ownership.

> "When one holds the legal title and another is beneficially entitled in whole or in part, an implied or constructive trust arises in favor of the latter to the extent of his interest."

Smith's Exer. vs. Proffitt's Admr. 82 Va., 851.
Borst vs. Nalle et al., 28 Grat. (Va.), 435.
Floyd vs. Harding, Idem 406.

On October 26, 1900, the attachment lien was acquired by petitioner. It was conceded that the attachments levied became valid liens upon the beneficial interest of the Roanoke Furnace Company, because of its failure to record the evidence of its purchase, as required by the registry statues of Virginia. (See Supra, Statement of Morris, J.)

On November 5th, 1900, Baird by deed admittedly valid (R. p. 10, Article 8), conveyed the legal title to the Roanoke Furnace Company, which said deed was at once recorded as required by the Registry statues of Virginia and thereupon every vestige of interest, legal or equitable, passed from Baird and subsequent to that time, under the laws of Virginia, neither he, or any one claiming under him, or any creditor of his, either had or could acquire any interest therein, or lien

thereon, because of his previous ownership.

On December 24th, 1900, the petition in bankruptcy was filed against Baird, and as of that date, under the laws of Virginia, neither he nor any general creditor of his had any interest in or right to proceed against the attached property, and had not had for forty-nine days prior thereto.

It is submitted that under the laws of Virginia Baird had no beneficial interest in the property attached when the lien was acquired, and had neither interest or title when the bankruptcy petition was filed against him.

The words "the property of the bankrupt" as used in the Act and the decisions, mean only the property to which the bankrupt *is beneficially entitled*, and does not include property to which he has the bare legal title.

Hewit vs. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986.

Low vs. Welch, 139 Mass. 33, 29 N.E. 216.

Mr. Justice Holmes, when delivering the opinion in the case last cited, used this language:

> "The defendant concedes that, if the words, 'property of the debtor' stood alone, they would not extend to property in which he had no beneficial interest, but merely a bare legal title. This concession is just, and is required by the cases. It cannot be supposed, in the absence of any particular equity or special and overriding policy, that a bankrupt or insolvent law intends to throw all property to which the debtor may have a naked title into the hands of his creditors. Such has not been the course of legislation or decision."

Bankrupt and Insolvent Laws are intended to secure the application of the effects of the debtor to the payment of his debts, (omitting question of discharge), and do not affect property held in trust:

2 Kent's Commentaries, p. 389-400.

Kip vs. Bank of New York, 10 Johns. Rep. 63.
Dexter vs. Stewart, 7 Johns. Ch. Rep. 52.
Yates & M'Intyre vs. Curtis, 5 Mason's Rep. 89.

The object of Bankruptcy Acts, the fundamental principle upon which they are founded so far as creditors are concerned (other than the subject of discharge), is to take possession of, through the medium of a trustee, *the property* of the insolvent debtor, convert same into money and distribute it among the general creditors without preference. For that purpose, and that alone, the Bankruptcy Act declares void certain liens acquired within a specified time upon the property of the bankrupt.

Mayer vs. Hellman, 91 U.S. 503, 23 L. ed. 377.
Yeatman vs. New Orleans Savings Inst., 95 U.S. 764, 24 L. ed., 589.
Stewart vs. Platt, 101 U.S., 731, 25 L. ed. 816.
Connor vs. Long, 104 U.S., 244, 26 L. ed., 725.

The Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the property of the bankrupt which passes, or should pass to his trustee, and rights become vested as of the date the petition is filed.

In the case of Hewitt vs. Berlin Machine Works (194 U. S. 302, 48 Law Ed., 988), the Court adopted and approved the language of the C. C. A. of the Second Circuit, and said:

> "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors *at the time when the trustee's title accrues.* The present act, like all preceding acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors, shall remain undisturbed."

In the case of Pierie vs. Chicago Title and Trust

Co. (182 U.S. 449, 45 Law Ed., 1178), the Court used this language:

> "It is hardly necessary to assert that the object of a Bankruptcy Act, so far as creditors are concerned, is to secure equality of distribution among them of *the property of the Bankrupt.*"

Mr. Justice Catron, in the case re. Klein, which is cited and approved in Hanover National Bank vs. Moyses (186 U.S., 185; 46 Law Ed., 1118), in discussing the constitutional provision for a national bankrupt act, said.

> "Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: *To what limits is that jurisdiction restricted?* I hold it extends to all cases where the law causes to be distributed *the property* of the debtor among his creditors. This is its last limit."

Mr. Chief Justice Waite, in the case in re. Deckert, which case was cited and approved in Hanover National Bank vs. Moyses, supra, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

> "But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose.* * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

Under the present Bankrupt Act, as under previous Bankrupt Acts, the trustee takes the property of the bankrupt, (in cases unaffected by fraud) in the same plight and condition that the bankrupt himself

held it. In other words, the trustee occupies no higher position than the bankrupt and his general creditors as of the date the petition was filed, except as to an encumbrance which is void by some positive provision of the act.

Thompson vs. Fairbanks, supra.
In. Re. Garcewich, 115 Fed., 87, and cases there cited.

The property attached in the case at bar was not the property of the bankrupt in any sense of the word, as of the date the petition was filed.

The Act creates no assets, and does not attempt to deal with the rights which may exist between a creditor of a bankrupt and a third party. The relations of the creditor, his right to collect of others, the personal security he may have or acquire, is no concern whatever of the bankrupt's trustee. It is immaterial whether rights which do not affect the bankrupt's estate were created by contract or by the failure of a third party to comply with some statutory requirement.

Swartz vs. Fourth National Bank, 117 Fed., 7.

The District Court and the Circuit Court of Appeals in the case at bar, disregarded the general object and purpose of the Bankruptcy Act, and based their opinions upon a literal gratification of a portion of Sec. 67f, which Section is as follows:

> "f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attach-

ment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such coveyance as shall be necessary to carry the purposes of this section into effect."

(30 Stat. at L. 565, Chap. 541, U. S. Comp. Stat. 1901, p. 3418.)

"In the exposition of a statute, the intention of the law-maker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter."

1 Kent's Com. 461.

It is a general rule that the cardinal purpose or intent of the whole Act shall control, and to effectuate that intent a limitation if necessary will be placed on the sense of general terms.

Sutherland on Statutory Construction, p. 318, and the numerous cases there cited.

It is submitted that the above section must be construed with reference to the purposes it was enacted to accomplish; that the purpose of the present act (other than the subject of discharge) is to take possession of, through the medium of a trustee, *the property* of the insolvent debtor, convert the same into money and distribute it among the general creditors without preference.

II

A lien to be void under Section 67f must be, upon property which passes to the trustee of the bankrupt, (under other provisions of the act) *as a part of the bankrupt's estate.*

In Powers Dry Goods Co. vs. Nelson (10 N. D., 580) the Court said:

"Section 67f after declaring that all attach-

ments levied within four months prior to the filing of the petition shall be null and void, and discharged and released, declares that the effect of such a discharge shall be to pass the property covered by the lien *'to the trustee as a part of the estate of the bankrupt.'* It is entirely plain that this section does not refer to liens upon property which the Court does not undertake to administer and over which it has no jurisdiction. * * * * If defendants's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property, is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; * * * no such absurd construction can be sustained."

In Frazee vs. Nelson (61 N. E. R., p. 40) the Supreme Judicial Court of Massachusetts held:

"The effect of Section 67f of the U. S. Bankruptcy Act of July 1, 1898, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy, and those claiming under him, *so that the property may pass to and be distributed by him among the creditors of the bankrupt.*"

In McKenny vs. Cheney (Vol. II, A. B. R., p. 54) the Supreme Court of Georgia cites with approval the construction given Sec. 67f by the Supreme Courts of Massachusetts and North Dakota. And also cites with approval, the case of Robertson vs. Wilson (15 Kansas, 595). And says:

"In the Kansas case the Court said:

" 'As the Bankrupt Court gets no jurisdiction of the exempt property, it would seem that it should take none over any specific liens upon such property. The lien in that case was that of an attachment levied within four months prior to the adjudication in bankruptcy. It was held that, as the homstead did not pass to the assignee in bank-

ruptcy, the bankruptcy proceedings did not dissolve the attachment.'"

The section in question annuls and revives certain liens on the bankrupt's property; it declares that certain liens against the bankrupt shall be made null and void, and then places thereon this qualification:

> "Unless the Court shall, on due notice, order that the right under such levy, judgment, attachment, or other liens, shall be preserved for the benefit of the estate."

The power given to the Court of preserving such liens is co-extensive with the destructive operation of the statute. Only a lien which is made void by clause "f" can be preserved by the Court under clause "f." If the lien be not destroyed by operation of the law, then there is no power give the Court to preserve it.

In order, therefore, to determine what liens the Court can preserve, it is necessary to determine what liens are void under the Section. It is submitted that only those liens are void by the operation of clause "f" which are upon the property of the bankrupt which can pass to the trustee. The statute says that all levies, judgments, attachments, or other liens against the bankrupt shall be void; but manifestly it does not mean that when such liens operate upon the property of others than the bankrupt and work no diminuation of the bankrupt's estate, that they shall be void as to such other property. By the very terms of the Section a lien to be void must be upon the property which passes to the bankrupt's trustee. The language of the Section is specific that the property "*shall pass to the trustee as a part of the estate of the bankrupt, unless, etc.*" The conclusion is inevitable that the section makes void only those liens which are upon property which could pass to the trustee of the bankrupt. It is the lien which is invalidated, the active effect of the attachment against the property is what is intended to be destroyed. Now, against what property? Necessarily, against the property owned by the bankrupt as of the date the

petition was filed against him, or such as is covered by Section 70-a, for no other property can pass to the trustee.

I contend that the primary object of this Section was to prevent preferences and facilitate administration. The object of law is to destroy all preferences, and therefore, it destroys liens acquired within the prohibited period, and distributes the assets which belong to the bankrupt, or which his general creditors may subject, but as to those assets in which the general creditors have no interest, the assets of a party, other than the bankrupt, the attachment does not operate, either to prefer the attaching creditor, or to defer the general creditor, and consequently is unaffected by the act. I submit that any other construction would be outside of and a perversion of the objects and purposes of the Bankruptcy Law. It is submitted that the section, when construed as a whole, shows beyond question that the legislative intent was to render void liens upon the property of the bankrupt which could pass to his trustee, and that an attachment upon property which, when levied upon, was not property in which the bankrupt had a beneficial interest, and which, prior to the filing of the petition in bankruptcy, he had neither beneficial interest or legal title, is property which cannot pass to his trustee and consequently does not and cannot come within the operation of the Section, and is not void.

The rights of the trustee in bankruptcy have a composite character. He holds *the estate* of the bankrupt, and the *rights* of the bankrupt's creditors to and in that estate in trust, to apply the one for the purpose of the equalization of the other; he owns what the bankrupt owned at the date of the filing of the petition, and no more; he can do what the general creditors could do at the date of the filing of the petition, and no more. It must necessarily follow that when Section 67f annulled certain liens and provided that "The property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, ***and shall pass to the trustee as a part of the estate of the bankrupt,*** * * * if had ref-

erence solely to property which could pass to the trustee under other provisions of the act.

Sec. 67f was construed by the Supreme Court of Rhode Island, in the case of Doyle vs. Heath, (22 R.I., 213) and was cited and approved by this Court in Metcalf vs. Barker (187 U.S., 165, 47 L. ed., 122), the Court holding that the language "all judgments" was qualified and defined by the context of the act, and was limited to the lien or preference created by such a judgment, and said:

> "Such a construction seems to us to be in exact accord with the spirit and scope of the Act in general, as well as of Sec. 67—that no preference should be created within a specified time of filing the petition in bankruptcy." * * *

The Circuit Court of Appeals of the Fourth Circuit, in the case at bar, (R., p. 28), in discussing said section, used this language:

> "It is contended however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter clause of 67f can have reference only to liens on property, which, if the liens were annulled would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the most obvious meaning of the words. The wording seems clearly to contemplate *that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy,* and it would appear that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee."

The proposition involved in the above quotation, to wit, that a creditor, by reason of his being such, may secure a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, is a pioneer. It imposes a penalty upon a creditor of the bankrupt, by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party may have had upon the estate of the bankrupt. It brings into the estate as an asset the proceeds from a lien, not upon that estate, but upon property which no process from any Court, State or Federal, could have reached at the instance of the bankrupt or his creditors, as of the date the petition was filed. It, in effect and in fact, in the case at bar, creates an asset. After a most careful search, we have been unable to find any decision of any Court, holding that the Bankrupt Act avoided a lien on any property whatsoever other than that of the bankrupt which passed to his trustee. It has not heretofore been contended that a Bankrupt Court could take jurisdiction of a creditor of a bankrupt, for the sole reason that he was such. The jurisdiction of the Bankrupt Court, aside from the question of discharge, has heretofore been confined to the administration of the bankrupt's estate which passed to the trustee. It is submitted that this is the limit of the jurisdiction.

A preference within the meaning of the act is the acquisition by a creditor of a greater percentage of the *bankrupt's property*, than other creditors of the same class receive, and the consequent diminution of the bankrupt's estate.

N. Y. Co. National Bank vs. Massie, 192 U.S., 147-48, L. ed. 384.

Swartz vs. Fourth National Bank, 117 Fed. 1. In this case, at page 7, the court said:

"The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out*

of the estate of the bankrupt than that estate will pay on other claims of the same class. It is its effect *upon the equal distribution of the estate of the bankrupt*, not its effect upon the creditor, that determines the preference. * * *

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others*, the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. It is *the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out the estate of the bankrupt*, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

It is submitted that in the case at bar the attachment lien was upon property which did not belong to the bankrupt, and, in the language of the lower court, Record, page 19: "*Had valid attachments been not levied, the property would have passed to the trustee of the Roanoke Furnace Company.*" If petitioner's lien be sustained, and it be paid in full, it will not be paid out of the bankrupt's estate.

The distinction between a preferred creditor and petitioner is apparent. A preferred creditor gains an advantage over another creditor in subjecting to the payment of his debts, property which is otherwise liable for the payment of the debts of both parties. But the attached property in the case at bar was not liable *for the debts of any* simple contract creditor of Baird's when the petition was filed. By its attachment petitioner secured a lien on property which, prior to that time, was not liable to the payment of the debt of any simple contract creditor. It did not secure a *preference* on an existing asset; it, in fact, created an asset for the payment of its debts, out of property

which belonged to a third party, and, in the opinion of the Court, property which would have passed and did pass to that party's trustee.

It is respectfully asked that the orders entered subrogating Baird's Trustee to the rights of your petitioner by the District Court, and by the Circuit Court of Appeals be annulled, and that your petition be decreed, the proceeds from its attachment lien.

Respectfully submitted,

S. HAMILTON GRAVES,

Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. K. BAIRD & COMPANY, BANKRUPTS, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

(19,683.)

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REPLY BRIEF FOR PETITIONER.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In respondent's brief (p 3) the legal question which it is stated is involved, is as follows:

> "The question for the consideration of this Court is whether a creditor who levies an attachment on property on an insolvent debtor, within four months of the petition on which the debtor is adjudged a bankrupt, can retain the fruits of the attachment for himself alone, or must permit the general creditor of the bankrupt to share therein."

The general abstract proposition as stated, we trust we may never be guilty of the absurdity of denying; as the legal question of this case, however, it is inapplicable, it is incomplete, incorrect, and unfair. It assumes that the attachment in the case at bar was levied upon and is to be enforced against property which is a part of the bankrupt's estate.

The proposition so modestly assumed is in fact, the point in dispute, the basis of the litigation, the core of this case. When this court disposes of that proposition and holds that the property attached is, or is not, a part of the bankrupt's estate within the meaning of the Act, it will have decided this case.

The abandonment of the positions heretofore taken and insisted upon by respondent and the substitution of bald assumption for facts and law, is indeed a surprise.

The brief filed on behalf of respondents ignores the most pertinent fact of this case, to-wit, the contract of December 7, 1899. From the statements contained in the brief, and the inferences drawn therefrom, one, would infer, and it seems, that the impression was intended to be made that the **sale** and the execution and **delivery** of the deed were cotemporaneous.

It is desired to correct this impression. The vital importance in this case of the contract in question will be appreciated when its effect under the state law is given. The contract in question was for the sale of the attached property, and if recorded as required by the registry statutes would have the same force and effect as a deed. The registry statutes of Virginia provide —

> "Sec. 2464. IF IN WRITING AND RECORDED, AS VALID DEEDS—Any such contract if in writing, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract."

It is submitted that this Court, except where the Constitution, treaties, or statutes of the United States, otherwise require or provide, adopts the local law of real property as ascertained by the decisions of the state court, whether those decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state, which have become a fixed rule of property.

Jackson vs. Chew, 12 Wheat. 167. (6. L. Ed. 583.)

Under the law of Virginia, "if a contract is made for

the sale of lands, the seller is immediately regarded in equity **as trustee of the land for the purchaser**, and the purchaser as a trustee of the money for the seller. The vendee's interest, although no conveyance has been made, is treated as **real estate** and is devisable and descendible accordingly; and the vendor's interest is **personalty** and passes and is disposed of as such."

First Lomax Dig. p 200.

Moore's Admr. vs. Randolph 6 Leigh 180.

Withers vs. Carter 4 Grattan 414.

2 Minors Inst. 2 Ed. 191.

The contract in question having been executed more than twelve months prior to the filing of the petition in bankruptcy against either of the parties thereto, the status of the property is unquestionably fixed by the laws of Virginia.

An analysis of the brief of respondent's in so far as it attempts to deal with the status of the property attached, will show that two questions are presented. one question is based upon an inference which it is attempted to draw from the facts, the other is a question of law.

(1) The inferences drawn and then asserted as facts in the brief are, that the bankrupt Baird did not receive the consideration to which he was entitled for the West End Furnace property, but that from such consideration **was deducted the amount of the attachment**, and that the conveyance of November 5, 1900, was **fraudulent.**

In the brief, pages 5 and 6, it is stated "But the deed of conveyance having been delivered on November 5, 1900, subsequent to the levy of the attachments, for a **then** fair consideration" (record, No. 213, p 12, sec. 9), the consideration received by the insolvent Baird, for the property attached, whatever its amount, must have been diminished by the exact amount of the claims sought to be recovered by the attaching creditors, and thus, in legal effect, Baird's conveyance was the specific application by an insolvent debtor of a part of his property to pay in full the claims of a few creditors, in fraud of the Bankruptcy Act, and the enforcement of those

attachments would work preferences in their favor over his other creditors."

The statement that the deed was "for a then fair consideration," is in the facts agreed between the trustee of Baird, the trustee of the Roanoke Furnace Company and your petitioner. The only effect and meaning is and was that the consideration for which the deed passed was fair to all parties; that is, the rights of no party to the agreement were prejudiced thereby. By no reasonable or fair construction can it be made to refer to the passage of a consideration from the Furnace Company to Baird as of the date? The true consideration for the deed and its prior passage quoad Baird is conclusively shown in the same clause of the agreement.

The conclusion which is drawn to the effect that the consideration received by the insolvent Baird was diminished to the extent of the amount of the attachment, is without reason and in direct conflict with the agreed facts and with the injected facts, as will hereafter be demonstrated. It is contended by respondent as is stated in the above quotation from the brief, that the conveyance from Baird to the Furnace Company was "in fraud of the Bankruptcy Act." In the same sentence of the agreed facts in which is found the language from which the inference is attempted to be drawn, it is stated that, **the conveyance was valid and not affected by the bankruptcy proceedings.**

The statement in the agreed facts is as follows: (R. p 10 89). "That the deed of November 5, 1900, from said Baird to the Roanoke Furnace Company was a **valid conveyance** to a purchaser in good faith, for a then fair consideration, and **was not affected** by the **bankruptcy proceedings hereinbefore mentioned.**"

It will thus be seen that by the express terms of the agreed facts the consideration was a **fair one, the conveyance was valid** and **was not affected by the Bankruptcy Act,** the statement made in the brief is **that the conveyance was fraudulent,** and upon this statement, though made in direct oppositon to the agreed facts, the whole argument invoking the benefit of sec. 67-e of the Bankruptcy Act, is based. The considera-

tion as expressed in the deed (R. p 10 §9) is as follows:

> "That in consideration of the issueing and delivering of certain shares of the capital stock to the amount of $500,000.00 of the said Roanoke Furnace Company, **in pursuance of a certain agreement between the parties hereto, the receipt heretofore** of the certificates for which shares is hereby formally acknowledged. * * * * It is expressly understood and agreed, however, that this conveyance has been made subject to the payment by the Roanoke Furnace Company of the **balance** of the purchase money due, or to become due, to Robert E. Tod on the land of which the hereby granted premises are a part, the payment of which balance of purchase money has been assumed by the said Roanoke Furnace Company."

The above quotation is followed in the agreed facts by this statement:

> "That as of November 5, 1900, the amount due Robert E. Tod was something over $40,000.00, which amount was subsequently paid out of the proceeds from the sale of the property of the Roanoke Furnace Company."

There is absolutely nothing in this record which will justify even the inference that there was any diminution whatever of the purchase price, because of the levying of the attachments. It is not in the record, and has never before been intimated or suggested that Baird was to receive any consideration other than the $500,000.00 of stock of the Furnace Company, and this stock he received long prior to the levying of the attachment.

For the convenience of this Court I here insert the findings of fact on this point as made by the District Court, and the Circuit Court of Appeals:

The District Court in its findings of facts (R. p. 16) uses this language:

> "On December 7, 1899, Baird, by written contract, sold the furnace property to the Roanoke

Furnace Company, in consideration **of the issue to Baird of certain shares of the vendee's capital stock** and the assumption by the vendee of a purchase money debt owing on the furnace by Baird to R. E. Tod.

"This contract was never recorded. On November 5, 1900, Baird executed and delivered to the Roanoke Furnace Company **a deed in pursuance of the above mentioned contract,** conveying the furnace property, which deed was forthwith recorded."

The attention of the Court is called to the fact, that when this finding was made by the District Court, it had the **original** contract before it.

The Circuit Court of Appeals on this point made this statement of facts: (R. p. 26.)

"Chester R. Baird, trading as C. R. Baird & Co., on December 7, 1899, owned certain real estate in Virginia known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and **executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to-wit: shares amounting to $500,000.00 of the capital stock of the said Roanoke Furnace Company.**

"Under the contract of sale the Roanoke Furnace Company took immediate possession in December 1899, of the property so purchased," etc.

It is further stated in the brief, (p. 6) that "there are assertions in the briefs of the petitioners not warrented by the agreements." It would be unseemly to make the reply which the above statement merits.

Respondents state that in the brief of the Bank of Baltimore, "it is claimed that the property of Baird was parted with at the time of the contract of sale, for a fair consideration and without diminution because of the attachment; whereas, in the agreement it was

stated that the deed of November 5, 1900, was a valid conveyance for a then fair consideration."

A sufficient answer to this statement is, that the facts show (see statement of Morris, J., supra,) that the property was, by written contract, sold by Baird on the 7th day of December, 1899; that he received all of the consideration to which he was entitled under the contract; that he surrendered the possession of the property.

The record further shows that the attachment was not levied until the 26th day of October, 1900, over ten months subsequent to the contract of sale and purchase; that the sale as made by that contract was for a fair consideration has never been questioned, either in the pleadings or in the facts agreed, on the contrary, the deed which was made on November 5, 1900, in pursuance of that contract, is admittedly valid, that is, **it is stated to be valid in the agreed facts, though stated in the brief filed in this court to be fraudulent.**

It is presumed that the above quotation taken from the respondent's brief was really made for the sole purpose of providing an excuse for injecting into the case, **through the brief,** a statement to the effect that Baird was forced to pay for the Furnace Company to Tod, the original owner of the property, on account of his reserved vendor's line, the sum of $85,000.00. A sufficient and conclusive reply to this "injected fact" is; that it was alleged in the **original petition** filed in the District Court, (R. p 6) and **specifically denied in the answer** to that petition (R. p 14) and abandoned by respondents, apparently for lack of evidence, with which to support it. After asserting the payment of $85,000.00 to Tod by Baird for the Roanoke Furnace Company, the brief (p 6) adds.—

"This money was never repaid to Baird, **but the property charged with the attachments and with Tod's lien, thus reduced to $40,000.00,** was conveyed by the deed of November 5, 1900."

Take the above assertion and that of "diminution of purchase price because of the attachment," and the allegation of the petition (originating this case) filed February 27, 1900 (R. p 6) and state the account--

Roanoke Furnace Company

To C. R. BAIRD, Dr.

	To amt. paid Tod acct. vendor's lien, (assumed by		
1900.	Ro. Furn. Co.)	$85,000	
Nov. 5.	By amt. of rebate on acct. of attachments, ...		$45,000
1903.			
Feb. 27	To bal. due as per petition,		85,000
		$85,000	$130,000

According to the above account, either their statement of "real facts" is incorrect, or their claim of diminution because of the attachments is absurd. The court is asked to bear in mind that the only consideration which was to pass from the Roanoke Furnace Company to Baird under the contract was **stock**, that Baird **received the stock**, that one theory of the brief is that the Roanoke Furnace Company again became indebted to Baird because of payments subsequently made by him to Tod. Assuming for the sake of argument only, that this payment of $85,000.00 was made by Baird to Tod, petitioner did not attach this debt, and further Tod's debt was secured by a vendor's lien, and if Baird made such payment he was entitled to that lien, which was the first encumbrance upon the property. The agreed facts (R. p11, sec. 11) state:—

"That the proceeds from the sale of the property which was conveyed by the deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company were not only sufficient to pay off and discharge all liens thereon prior to that of the First National Bank of Baltimore, but were also sufficient to pay off and discharge the lien of said bank, as evidenced by said attachment, principal, interest and costs."

There can be no question that if Baird had this prior lien he has been paid.

In concluding our reply to this branch of the case as asserted by the brief, we ask that this case be decided upon the record, and not upon "injected facts," or inferences which are in direct conflict with the agreed facts.

(2) The proposition of law asserted (brief p 13) is, that because of the purchaser's failure to record the evidence of its purchase as required by the Registry Statutes of Virginia, the attachment by a creditor of the vendor became a lien, that to the extent of such lien the subsequent alienation was void as to the attaching creditor; that the property attached to the extent of the lien acquired remained the property of the vendor **as to such creditor.** They say, therefore, the lien is against property which is a part of Baird's estate.

We reply that the premises do not justify the conclusion.

(See Parker vs. Dillord, et als. 75 Va. 418).

The proposition that, a lien upon property, to the extent of its amount creates a beneficial ownership in that property in the debtor against his prior valid contract of sale and against his subsequent valid deed, for a full and fair consideration, is to me incomprehensible. Such a rule of law would, as was in effect said by the dissenting judge (of the C. C. A.), "convert a liability into an asset." It would create a new and novel form of ownership, neither founded in reason, sustained by authority, or in any manner heretofore known to the law. In the case at bar the lien was petitioner's, and the property upon which it was acquired was that of the Roanoke Furnace Company and had been for over a year prior to the filing of the petition in bankruptcy against Baird.

The case of March, Price & Co. vs. Chambers et al., 30 Grat. 299, (cited in respondent's brief, p 13), is the law of Virginia; and emphasizes that the right is the lien creditors only, that case was before us when the agreed facts were prepared, and in consequence, it was therein stated: (R. p 10, art. 8).

> "That inasmuch as neither the contract nor deed from C. R. Baird to the Roanoke Furnace Company had been recorded at the time of the levying of the said attachment and filing of **lis pendens** by said bank, the property conveyed by such deed is to be deemed and taken under the laws of the state of

Virginia to be the property of the said C. R. Baird, **quoad the said attachment and no further.**"

We assert that the Registry Statute creates no right of property in the vendor.

The effect of the statute can be stated by showing the rights of parties in a case to which the statute does not apply. The case of Floyd, Trustee, vs. Harding, et al., 28 Grat. 407, was a case which arose in Virginia where the sale was by parol prior to the statute requiring all contracts for the sale of land to be in writing. Judge Staples, who delivered the opinion of the court, after first stating "the purchaser is regarded as the real beneficial owner of the estate, and the vendor a mere trustee of the legal title for his benefit," said:

> "I speak now without reference to the recording acts. That the equitable estate of the purchaser is good against creditors of the vendor is incontrovertible. It has been over and over again decided that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist at the time in favor of third persons; and a court of chancery will limit the lien of the judgment to the **actual interest** which the debtor has in the estate."

The effect of the Registry Acts is to give to **a creditor** the right to impress with a lien the property of a party other than his debtor if the legal title stands of record in the name of that debtor. In the case at bar the bankrupt Baird had no beneficial interest in the property which was actually attached. Whatever claim, while we deny there was any, that he may have had against the Furnace Company, was personalty, and the property attached, the reality, was the property of the Roanoke Furnace Company. The attachment became a lien because of its failure to comply with the Registry Statutes of Virginia and record the evidence of its purchase.

The Circuit Court of Appeals recognized that in this case Baird had no interest, that the property attached was not Baird's, and it was driven to this position,—"that a creditor might obtain by reason of his being a creditor of the bankrupt, a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy." To this proposition we replied in our opening brief, page 19-20.

Respondents take the position in their brief that when the lien was acquired by petitioner, it was enforcing a right common to all the creditors of Baird, and therefore, should inure to the benefit of all; this contention is erroneous. The unrecorded contract of sale was void only as to those creditors who acquired a lien prior to its recordation. The right to acquire a lien was an inchoate one, at most, the general creditor had only a mere right or capacity to acquire a lien; this inchoate right under the laws of Virginia terminates as to the general creditors upon the happening of either of two events, the death of the grantor, (Dulaney vs. Willis, 95 Va. 606,) or the recordation by the purchaser of the evidence of purchase. The whole theory of respondent's case is this: that because of the acquisition of the lien by petitioner, **quoad it,** the subsequently recorded conveyance is void. They say, therefore, to the extent of that lien the property remains that of the debtor, and the appropriation of that property by petitioner will create a preference. This ignores the status of the property under the laws of Virginia; when the lien was acquired; the **legal title only** was in Baird, and the **beneficial interest** in the Roanoke Furnace Company. All that could pass from Baird by the subsequent deed was the legal title, this legal title and this alone, is void as to the previously acquired lien on the beneficial interest. Having stated our views in the opening brief, upon what constitutes a preference and the authority relied upon, we make no further comment as to that.

It is stated in the brief (p 15)"*****Counsel for the attaching creditors have been quite unable to show why the explicit provisions of Section 67-f of the Act should

not applies to this case." Our reply is, that to hold that section 67-f can apply, it must first be held, that a creditor who acquired a lien because of the failure of a purchaser from his debtor to comply with a registry statute, thereby to the extent of the lien created a beneficial interest in the attached property in his debtor, and that to hold this, is to extend a legal fiction to an absurdity.

It is further stated in the brief that we have been unable to show any statement of facts, hypothetical of course, to which this provision of section 67-f would apply. To this we reply, in our opinion the object of section 67-f was to prevent preferences as between the **general creditors** of a bankrupt **out of his estate** and to facilitate administration and thus preserve the estate of the bankrupt. An illustration of a proper application in our judgment of the section in question can be made in this case by supposing the fact, that just prior to the filing of the attachments now being litigated, a creditor of the Roanoke Furnace Company had placed an attachment upon the property, (as any creditor of the Roanoke Furnace Company had a right to do under the laws of Virginia,) and the attachment so levied had been of such an amount that the attached property when sold would not bring sufficient to pay all liens; then in the bankruptcy proceedings against the Roanoke Furnace Company, that attachment if stricken down would have permitted the present attachments to have been paid in full, while if that attachment was preserved for the estate of the Roanoke Furnace Company to the extent of its amount, the general creditors of the Roanoke Furnace Company, through its trustee, would have priority over petitioner.

Out of this case grows another illustration which shows the fallacy of respondent's contention in this case: suppose the Roanoke Furnace Company had remained solvent and one of its creditors had attached the property in question a day prior to the execution of the deed of November 5, 1900, such creditor must from necessity have made Baird a party to the attachment suit, the legal title being in him, would that

creditors lien have been void? Would it be contended that the lien was upon the property of the bankrupt Baird? If so, this anomaly would be presented: a person not a creditor of a bankrupt who had acquired a valid lien under the state law upon the property of his solvent debtor, having that lien declared void in a bankrupt proceeding instituted to distribute the estate of a third party.

It is further charged in the brief of respondents (p 15) that we contend that the liens referred to in 67-f are those which are upon **the property of the bankrupt**, while they contend that the act uses the word **person**, that it **means person** and that we are endeavoring to re-write the act. We submit that there is no such thing under the bankruptcy act as a creditor acquiring a lien against **the person** of the bankrupt debtor. We further reply that respondents cannot recover under 67-f unless they read out of that section the clause, "and shall pass to the trustee as a part of the estate of the bankrupt." In our opening brief we discussed at some length the proposition, that only those liens were avoided by said section which were upon property, that could pass to the trustee under the other provisions of the act, and as to that proposition we now refer to what was there said. (Brief p 15-19.)

In concluding this hastily prepared reply, it is submitted—

(1) That the property attached when the attachment was levied was not property in which the bankrupt Baird had any beneficial interest whatsoever, but was the property of the Roanoke Furnace Company.

(2) That as of the date the petition was filed, the attached property was not property which Baird could have conveyed or that could have been reached by judicial process against him at the instance of any creditor.

(3) That the property attached was not property which could pass to the trustee of the bankrupt as a part of his estate.

(4) That no preference will be given petitioner if it be permitted to collect the full amount of its attachment, since such collection will not be made out of the estate of the bankrupt.

Respectfully submitted,

S. HAMILTON GRAVES.

Counsel for Petitioner.

IN THE

Supreme Court of the United States

Receivers of
VIRGINIA IRON, COAL & COKE COMPANY
and others . . . . . Petitioners
vs.
WILLIAM H. STAAKE, Trustee for
C. R. BAIRD & CO., Bankrupts, . Respondent

BRIEF OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS.

In the Court below the facts were agreed upon and we adopt the statement of them made by the Circuit Court of Appeals in its opinion. (See record page 28). They are as follows:

Chester R. Baird, trading as C. R. Baird and Company, on December 7th, 1899, owned certain real estate in the State of Virginia known as the West End Furnace property and as of said date, he sold it to the Roanoke Furnace Company subject to certain existing encumbrances and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under

the contract, to-wit: shares amounting to $500,000 of the capital stock of the said Furnace Company. [This contract was not recorded in accordance with the Virginia Statute.]

After the contract of sale, the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the Company was executed by Baird until November 5th, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments amounting to over $40,000 (some of which were sued out by your petitioners) against Baird as a non-resident of Virginia, were issued at the instance of certain creditors and were levied upon the Furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon. (Code of Virginia, Sections 2463, 2464, 2465, and 2472). Within four months from the levying of the attachments, to-wit: On December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania and he was adjudged a bankrupt, and on January 2d, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29th, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt.

On March 26th, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June

29th, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

Under orders of Court, the property conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom and all these claims were submitted to the determination of the Court below by express consent of all the parties.

Upon the issues made by petitions and answers, the Court below ruled that the attachments against Baird, having been obtained through legal proceedings against him when he was insolvent and within four months prior to the filing of the petition in bankruptcy against him, were null and void under Section 67f of the Bankrupt Act of 1898, so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the benefit of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors and authorized and empowered to enforce said attachments and liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings interfered.

This decree of the District Court was affirmed on November 15th, 1904, in an opinion delivered by Morris, District Judge, concurred in by Goff, Circuit Judge—District Judge Purwell dissenting; and the case is before this Court on a writ of *certiorari*.

ARGUMENT.

Under the Registry Laws of the State of Virginia, a contract for the sale of real estate is good against subsequent purchasers for valuable consideration, without notice and creditors, provided it be admitted to record, but as to such persons it is void, if not recorded.

For the convenience of the Court, we here copy the provisions of the Code bearing on this subject:

"Sec. 2463: CONTRACTS IN CONSIDERATION OF MARRIAGE, OR FOR THE SALE OF REAL ESTATE, &c., VOID AS TO CREDITORS AND PURCHASERS, UNLESS IN WRITING—Every contract not in writing, made in respect to real estate or goods and chattels in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall be void, both at law or in equity, as to purchasers for valuable consideration without notice and creditors.

Sec. 2464. IF IN WRITING AND RECORDED, AS VALID DEEDS—Any such contract if in writing, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

Sec. 2465. CONTRACTS, DEEDS, &c., THAT ARE VOID AS TO CREDITORS AND PURCHASERS, UNLESS RECORDED—Every such contract in writing, every deed conveying any such estate or term, and every deed of gift, or deed of trust or mortgage conveying real estate or goods and chattels, shall be void as to subsequent purchasers for valuable consideration without notice and creditors, until and except from the time that it is duly admitted to record, in the county or corporation wherein the property embraced in such contract or deed may be."

Another Section of the Code defines what the words "Creditors" and "Purchasers" mean in the preceding Sections and is as follows:

Sec. 2472. WORDS "CREDITORS AND PURCHASERS," HOW CONSTRUED, LIEN OF SUBSEQUENT PURCHASER FOR PURCHASE MONEY

PAID BEFORE NOTICE—The words "creditors" and "purchasers" where used in any previous Section of this chapter shall not be restricted to the protection of creditors of and purchasers from the grantor, but shall extend to and embrace all creditors and purchasers who, *but for the deed or writing, would have had title to the property conveyed, or a right to subject it to their debts.* And as against any person claiming under a deed or other writing, which shall have not been admitted to record before payment by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he comes to a complete purchaser, shall, in equity, have a lien on the property purchased by him for so much of his purchase money as he may have paid before notice."

C. R. Baird was a non-resident of the State of Virginia and under Section 2959 of the Code of Virginia, the State Courts had jurisdiction to issue attachments against him and by virtue of the Registry Laws above mentioned the attachments which were issued on behalf of petitioner and other attaching creditors became liens upon the property which Baird had sold to the Roanoke Furnace Company on account of the failure of the Roanoke Furnace Company to record the contract of sale made about a year previous. It will be observed that Baird had parted absolutely, with all beneficial ownership in the property when he executed this contract. The Furnace Company had taken immediate possession and nothing remained to be done to perfect the absolute legal title in the Furnace Company, except delivery of the deed, which, as we have already stated, was executed and delivered November 5th, 1900, and promptly recorded, more than a month prior to the institution of the proceedings in bankruptcy. It is, therefore, perfectly obvious and there can be no dispute about it, that the attachments

sued out constituted liens on the property of the *Roanoke Furnace Company,* and not upon the property of *C. R. Baird,* at the time the proceedings in bankruptcy were instituted and the sole question for this Court to decide is, whether the bankrupt law of 1898 is intended, not only to avoid attachments and other levies which constitute liens on the bankrupt's property, but also to avoid similar attachments and other liens on property belonging to third parties, which are affected by such liens on account of the Registry Laws of the State of Virginia. It is true that these attachments were sued out against C. R. Baird and were based upon debts of C. R. Baird, but they constituted liens only on the property of the Furnace Company and not upon any property of Baird.

It is conceded that these attachments are valid attachments as against the property of the Roanoke Furnace Company. If there were no bankrupt proceedings and for any reason these attachments could be invalidated, then, unquestionably, this would result solely to the benefit of the creditors of the said Furnace Company. If no attachments had been issued at all, there can be no question that the trustee in bankruptcy of the Furnace Company would have been entitled to this property absolutely free from any claim to it on the part of the trustee in bankruptcy of Baird.

But the Courts below have held in this case that Section 67f was intended to endow the bankrupt courts of the United States with the power and jurisdiction of reaching out and gathering in, not only all of the estate of the bankrupt, but also, all of the property of third parties that may be affected by liens on account of the debts of the bankrupt, provided they come in other respects within the purview of that Section.

Section 67f provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is

insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this Section into effect, provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

A careful reading of the above language, if taken in connection with all the other provisions of the Bankrupt Act of 1898, we respectfully submit, leads to the conclusion that while the above Section uses the language "against a person who is insolvent" that the real meaning and intention of the Section was that all attachments or other liens obtained against the *property* "of a person who is insolvent" at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void.

It must be remembered that an attachment proceeding is a proceeding *in rem*. Its object is not to get a personal judgment against the debtor, but to sequestrate his property and make it liable for his debts.

It may be true that the filing of a petition in bankruptcy is in effect an attachment levied in behalf of *all* the bankrupt's

creditors. But the difference between bankrupt proceedings and an attachment under our State Laws is that an attachment levied on behalf of a creditor under the State Law may constitute a lien not only on the property of the debtor, but upon the property of others besides the debtor; and the lien created by it is simply for the benefit of the attaching creditor and no other creditor; whereas, the filing of a petition in bankruptcy is intended to affect only the bankrupt's property and the proceeding is not for the benefit of the creditor who institutes it solely but for the benefit of all the creditors. In Frazier's case, 9 Amer. Bankr. Rep. 21, 171 Fed. 746, it is said

"The moment the petition is filed the proceedings is in rem. It, in legal effect, sequestrates all of his [the bankrupt's] property interests for the benefit of all his creditors pari passu as if siezed under attachment or the writ of execution. His whole estate passes into custodia legis. Eo instante, every creditor of the bankrupt becomes an adverse party in a legal proceeding for the appropriation of the property of the bankrupt. He stands as a creditor seeking the aid of a Court of exclusive jurisdiction."

We think it clear that the purpose and aim of the bankrupt laws of the United States, whether constitutional or statutory, are to deal with,

(1) The Insolvent debtor,
(2) His estate,
(3) His creditors,

and that with the estates or debts of others than the bankrupt, it was not intended to have anything to do.

The 16th Section of the bankrupt law of 1898, provides "that the liability of a person who is a co-debtor with or guarantor, or in any manner a surety for the bankrupt shall not be altered by the discharge of such bankrupt." This Section indicates that it is the property of the bankrupt

alone which is intended to be affected by the bankrupt proceedings.

The Bankrupt Act does not undertake to interfere with the bona fide alienations by the bankrupt of his property before the institution of bankrupt proceedings against him. It is only where such alienation is in fraud of his creditors that the bankrupt law seeks to interfere. Apart from this qualification, the law takes the property of the bankrupt as it stands at the date of the institution of the proceeding and places it in the hands of a trustee to be equally distributed amongst all of his creditors. As to this property, it has been held time and again both under the present law and under the law of 1867, that the trustee in bankruptcy takes no greater interest in the property than the bankrupt himself.

See Mattocks v. Baker 2 Fed. 455.
Yateman v. Savings Institution 95 U. S. 764.
Stewart v. Platt 101 U. S. 731.
Re New York Economical Printing Co. 110 Fed. 514.
Hewit v. Berlin Machine Works 194 U. S. 296.
(L. E. 986.)

It is submitted, therefore, that Section 67f can not be construed to go as far as was held by the Circuit Court of Appeals in this case, without giving the present bankrupt law a very much wider range than has ever been given it before, and one that does violence to all of our pre-conceived notions of the object of a bankrupt law. While this Section does not in terms, refer to preferences yet the avoidance of preference amongst the creditors of a bankrupt, is the corner stone of the whole structure of the bankrupt law and it is impossible to believe that in this particular Section, this idea was intended to be left out. Independent of the bankrupt law, it has been held in Virginia that a debtor can make an assignment preferring certain creditors and it will be good against creditors whose claims are postponed, and this is true in a large number of States—and the main object of

the provision of the constitution of the United States (Article 1, Section 8) that "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States," was to enable Congress to put it out of the power of an insolvent debtor to do injustice to his creditors by making fraudulent preferences.

See McKenney v. Cheney 11 Am. Bk. R. 54, 58.
Swartz v. Fourth National Bank 117 Fed. Rep. 3.

But when we speak of preferences the pertinent question arises, preference as to what? Obviously, it can only be a preference by one creditor of the bankrupt over others as to the *property of the bankrupt*. Under the provisions of the present law, the rights of creditors who have other security than that of the property of the bankrupt, are clearly recognized and provided for. It can not be believed that the mere fact that the attachments in this instance were against Baird, who was, at that time, insolvent, and that they were issued within four months prior to the filing of the petition in bankruptcy against him, is sufficient to bring the case within the operation of Section 67f. With all due respect, it seems to us that the conclusion at which the District and Circuit Court of Appeals arrived, was due to a too literal adherence to the exact language of this Section, and enough weight was not given to the potent fact that the Court was dealing with the property of a third party and not with that of the bankrupt.

The attention of the court is called to the fact that Section 67f after providing that the attachments and other liens therein mentioned, shall be decreed null and void in case the party is adjudged a bankrupt, declares that the property covered by the lien shall be decreed "wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." This language clearly

shows that the property to which the Section refers is property which, but for the lien, would pass to the trustee of the bankrupt. See

Powers Dry Goods Company v. Nelson 10 N. D. 580.
Frazee v. Nelson 61 N. E. 40.
McKenny v. Cheny 11 Amer. Bankr. Rept. 54.

As we have seen, all title, interest and equity in this property had passed out of Baird prior to the institution of the proceedings in bankruptcy and had vested by a valid deed in the Roanoke Furnace Company, and, therefore, if the attachments levied be destroyed, the property could not possibly pass to the trustee of Baird.

The trustee in bankruptcy of Baird could stand in no higher position than a general assignee to whom a deed had been made by Baird conveying the property for the benefit of all of his creditors. If such a general assignment had been made it is obvious that the property, the title of which had passed to the Furnace Company, could not have been conveyed to the general assignee.

See in re Grissler 136 Fed. 754.

Another error into which the lower Court fell, we submit with all due respect, was a failure to recognize clearly the fact that the Registry Laws set out in the Sections of the Code of Virginia, above quoted, were not intended to protect *general* creditors but *only lien creditors.* As has already been stated, under our attachment proceedings in the State Court, the parties obtaining attachments were the only parties who could be benefited thereby. The general creditors of Baird had no earthly interest in such proceedings. There was no possible way in which they could come in and claim the benefit of the attachments. If no bankrupt proceedings had interfered, there can be no question that the only creditors who could have enforced their claims against

the property levied on, would have been those who had obtained liens by suing out the attachments. Section 2472 clearly shows the kind of creditor that was intended to be protected by the Registry Laws, expressly providing that such laws were intended to embrace "all creditors * * * who but for the deed written would have * * * a right to subject it to their debts * * * *"

The Supreme Court of Virginia, in the case of McCandlish v. Keen, 13 Grat. 615, has practically construed the Registry Laws to be confined to the protection of lien creditors. To the same effect is the case of Dulaney v. Willis 95 Va. 609.

In West Virginia, the statutes of recordation are practically the same as those in Virginia and there it has been held that they apply only to *lien* creditors.

See Houston v. McCluney 8 West Va. 153.

To hold that a failure to record a deed would avoid it as to general creditors would result in such obvious inconvenience to the public that no law of that kind would be permitted to remain upon the statute books of any State for any length of time. Such a law would obviously so interfere with the transfer of real property that it would almost put a stop to it. A party examining the title to real estate under such law would not only have to look at the records in the Registry Office but would have to make inquiries as to all of the debts of the owner of the property before he would dare to pass upon the title. The effect of the Registry Laws must not be confounded with the case of a fraudulent conveyance in which case by an express provision of our statutes (Code, Section 2460) general creditors are allowed to come in and participate with the lien creditors in the property of the debtor fraudulently conveyed. Here no question of fraud arises. It is agreed that the deed from Baird to the Furnace Company was valid. The attachments sued out were

based upon the non-residence of the debtor solely and did not seek to reach property conveyed away in fraud of creditors. These attachments reached the property of the Furnace Company, not because it was a fraud for the Furnace Company to hold this property, but simply because the Furnace Company had failed to record the contract, which was the evidence of its title.

A further discussion of this matter would, in our opinion, serve no good purpose, as it seems to us our argument is practically contained in the statement of facts, and we can not see that any new light would be thrown upon the subject by an attempt to present the facts from other standpoints than those already pointed out.

It is, therefore, respectfully submitted that the decree of the Circuit Court of Appeals should be reversed, and that it should be held that your petitioners along with the other attaching creditors are entitled to the lien of their attachments for the full amounts which they may prove are due them.

Respectfully Submitted,
WM. GORDON ROBERTSON,
EDWARD W. ROBERTSON,
of Counsel for Petitioners.

Holmes Conrad,
Of Counsel.

FILE COPY.

IN THE

Supreme Court of the United States

RECEIVERS OF
VIRGINIA IRON, COAL & COKE CO., ET ALS.

PETITIONERS

V.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS

RESPONDENTS

October Term, 1905, No. 214

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth District

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REPLY BRIEF FOR PETITIONERS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

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HOLMES CONRAD
WILLIAM GORDON ROBERTSON
EDWARD W. ROBERTSON
For Petitioners

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905, No. 214.

Receivers of Virginia Iron, Coal & Coke Co., et. als.

PETITIONERS,

v.

William H. Staake, Trustee of C. R. Baird & Company, Bankrupts.

RESPONDENTS.

QUESTION INVOLVED.

It is stated in the brief of counsel for Respondent that the question involved is,

> "Whether a creditor who levies an attachment on property of an insolvent debtor within four months of the petition on which the debtor, is adjudged a bankrupt, can retain the fruits of the attachment for himself alone, or must permit the general creditors of the bankrupt to share therein."

A brief consideration of the record will show that this is not the question involved at all. The real question is, whether an attachment, which becomes a lien on the property of *a third* party (and not upon that of the bankrupt) by virtue of the Registration Laws of the State of Virginia, is void, simply be-

cause the claim upon which the attachment is based is against the bankrupt.

ARGUMENT.

In the brief filed for respondent, the right of the trustee of the bankrupt to avoid the attachments levied upon the property of the Roanoke Furnace Company, is sought to be maintained on two grounds, and we will consider those two grounds in the order stated in said brief.

(1) It is claimed that the attachments can be avoided under section 67e of the Bankrupt Act. In the argument made to sustain this proposition, it is assumed by learned counsel for respondent that the Furnace property, which had been sold on December 7th, 1899, by Baird to the Roanoke Furnace Company by a written contract, and the legal title of which was conveyed on November 5th, 1900, for a valuable consideration, and with no fraud in the contract or deed, still remained the property of Baird. Counsel for respondent leave out of view entirely the contract of December 7th, 1899, and discuss the case as if the deed of November 5th, 1900, was the first and only transaction between Baird and the Furnace Company. The agreed statement of facts, which will be found on page 14, Record 214, sets out fully the nature of this contract. (See section 4 of said statement, Record 214, page 15). As soon as this contract was made under the laws of the State of Virginia, as under the Common Law universally prevailing, the Roanoke Furnace Company became the beneficial owner of the land, including the Furnace thereon, which was agreed to be conveyed to it.

See II Minor's Institutes (3d Ed), p 217, where it is said, "If a contract is made for the sale of lands, the seller is immediately regarded as trustee of the land for the purchaser and the purchaser as a trustee of the money for the seller."

Baird retained no lien on or interest in the property itself, but became owner, by virtue of this contract, of $500,000.00 worth of the stock of the Roanoke Furnace Company.

In order to prevent possible confusion, the attention of the Court is called to the fact that the case of the First National Bank of Baltimore vs. William H. Staake, Trustee, No. 213 on the docket of this Court, was heard and determined together with the present case, No. 214 and that, while a separate agreement as to the facts was made between the First National Bank of Baltimore and the Trustee of the Bankrupt, (See Record in 213, page 8), in addition to the agreement as to the facts made with the Receivers of the Virginia Iron, Coal & Coke Company and others, (See Record 214, page 14), both agreements as to the facts were relied on and incorporated in the answer of our clients, as well as in the answer of the First National Bank of Baltimore. (See Record No. 214, page 17.)

By reference to Record No. 213, page 10, it will be seen that the consideration for the deed of November 5th, 1900, is set forth in full, and is as follows:—

> "That in consideration of the issuing and delivering of certain shares of the capital stock to the amount of $500,000.00 of the said Roanoke Furnace Company, in pursuance of a certain agreement between the parties hereto the *receipt heretofore of the certificates for which shares is hereby formally acknowledged*. It is expressly understood and agreed, however, that this conveyance has been made subject to the payment by the Roanoke Furnace Company of the balance of the purchase money due or to become due to Robert E. Tod on the land of which the hereby granted premises are a part, the payment of which balance of purchase money has been assumed by the said Roanoke Furnace Company." And the further statement is made, "That, as of November 5th, 1900, the amount due

Robert E. Tod was something over $40,000.00, which amount was subsequently paid out of the proceeds from a sale of the property of the Roanoke Furnace Company."

From this statement, it appears that *prior* to the deed of November 5th, 1900, Baird had received the entire consideration for the deed, namely the $500,000.00 of stock of the Furnace Company, and that the amount then due to Tod was only Forty Thousand Dollars, and that this had been paid out of the proceeds of the sale of the property of the Furnace Company. Yet on the face of this statement, it is claimed, in the brief of our opponents, (See Respondents Brief, top of page 6) that "the consideration received by the insolvent Baird, for the property attached whatever its amount, must have been diminished by the exact amount of claims sought to be recovered by the attaching creditors." If this were a fact, it is impossible to believe that it would not have been inserted in the agreed statement of facts. And yet we find there absolutely nothing in regard to this matter.

In addition to this, counsel for respondent, at the bottom of page 6 of their brief, again go outside of the record and make a statement of fact, for which there is absolutely no proof and upon which the agreed statement of facts is silent, as to the amount paid by Baird for the Furnace Company to Tod, the original owner of the property, as an alleged part of the amount which had been assumed by the Roanoke Furnace Company. It is true that a claim of this kind is set up in the petition (See Record No. 214, page 10, section 2, of the petition), but it is denied in the answer of our clients which admits as true only the facts agreed on and no proof was taken to substantiate this claim. We assume, therefore, that this court will not pay the slightest attention to any statements of this kind, but will

confine itself strictly to the record before it and the agreed statements of fact therein contained.

It is claimed in respondent's brief that the briefs submitted by petitioners contain assertions not warranted by these agreements. It is said, "In the brief of the Receivers of the Virginia Iron, Coal & Coke Company, it is asserted that the attachments were against the property of Roanoke, whereas, in the agreement, it was stated that the attachments were against the estate of Baird. (See Record No. 214, page 18, section 8.)" We invite the attention of the Court to the exact language used in section 9 of said agreement to show that counsel for the respondent have not, themselves, stated accurately what is contained in said agreement. Section 8 says nothing about the property being that of Baird, but Section 9 reads as follows:

(Record 214, page 16.)

> "That inasmuch as the contract and deed from C. R. Baird and Company to the Roanoke Furnace Company had not been recorded at the time of the levying of such attachments, the property therein conveyed is to be deemed and taken under the laws of the State of Virginia, as the property of the said C. R. Baird *quoad* the said attachment creditors of the said C. R. Baird and Company in the said schedule mentioned, and *quoad* the liens and debts therein referred to and *no further*, and that said attachments were valid liens on the property levied on as of the dates of said levies respectively, subject to corrections, if any, as to the amounts of said debts."

This language, it is respectfully submitted, can not be construed into an admission on the part of petitioners that the property actually belonged to Baird at the time of the levying of the attachments. Section 4 of the same agreement, already adverted to (See record 214, page 15), had already set forth the *facts* about the contract and about the deed. Section 4 must be read along with Section 9 in order to clearly under-

stand the latter. It will be seen, when this is done, that Section 9 simply contains a form of statement as to a conclusion of *law*, not a statement of *fact*, and that, it does not, even as a matter of law, state that the property was absolutely that of Baird, but it says that it

> "Is *to be deemed and taken* under the laws of the State of Virginia as the property of C. R. Baird, *quoad* the said attachment creditors of the said C. R. Baird and Company in the said schedule mentioned, and *quoad* the liens and debts therein referred to and *no further*."

It is obvious, when this language is read, with the first clause of Section 9, that all that it meant was, that the failure to record the contract, as well as the deed, rendered both the contract and the deed invalid as to the attaching creditors, but "*no further.*"

This is a very different proposition from the bold and unqualified assertion that the property was Baird's made in respondents brief.

By reference to Section 2464 of the Code of Virginia which is inserted on page 4 of our opening brief, it will be seen that it is provided, that

"Any such contract, if in writing [i. e. a contract in writing for the sale of land] shall, from the time it is duly admitted to record be as against creditors and purchasers as valid, *as if the contract was a deed conveying the estate* or interest embraced in the contract."

Section 2465, which immediately follows the foregoing section, provides that, such contract shall be void as to purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record, etc.

If, therefore, the contract of December 7th, 1899, had been properly recorded, then it would have been as good as a deed

and the attaching creditors would have obtained no lien on the property. The failure to record the contract does not affect it as between the parties, but only as to purchasers and creditors.

See Young v. Devries 31st Grattan page 308 in which the Court of Appeals of Virginia in speaking of a case where parties had purchased land under a written contract which they had failed to have recorded, and against which the lien of a judgment against the vendor was enforced, uses the following language:—

"If any injustice is done to them in subjecting the lands in their hands to the judgments rendered against their vendor, it is due to their negligence. The law pointed out to them a plain duty; that of putting on record the evidence of their title. Having failed to do so the loss must fall upon them."

Thus it is seen that it is the duty of the vendee and not that of the vendor to record his contract in such a case. In fact, he is the only party who has control over the contract and has the right to record it.

There is no provision in the Bankrupt Act, nor in the laws of the State of Virginia, upon which to base the claim to the effect that if the petition in bankruptcy against Baird had been filed on the date immediately succeeding the levying of the attachments, that the Trustee in bankruptcy would have stood in the same situation as an attaching creditor as against the Roanoke Furnace Company. If there had been no attachments at all, a petition in bankruptcy filed at any time after the 7th day of December, 1899, when Baird made the written contract with the Furnace Company for the sale of the Furnace property, would have had no effect whatever as to the property embraced in said contract. It is not pretended that there was any fraud against the creditors of Baird or against the provisions of the Bankrupt Act, but it was admitted that this was a valid contract. The registration laws of the State of Virginia do not protect the Trustee in bankruteyp

any more than the bankrupt himself, as to a valid sale of real estate. Such trustee stands in the shoes of the bankrupt and can make no higher claim to the property embraced in said contract than the bankrupt could himself.

In addition to the authorities we have quoted in our opening brief on this point, we call the attention of the Court to Collier on Bankruptcy (5th Edition) page 554, where it is said

"It is well settled that the trustee takes not as an innocent purchaser, but subject to all valid claims, liens and equities. Thus, he has no better title than the bankrupt had."

See also

Chattanooga National Bank v. Rome Iron Company 4 A. M. B. R. 441, 102 Fed. 755.

See especially page 446 in which the Court quotes with approval the following language of Judge Story in the case of Winsor v. McClellan 2d Story 492.

"Now the principle has been long established that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand * * * * * * * *

"The assignee in bankruptcy takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it and subject to all the equities which exist against the same, in the hands of the bankrupt. This was clearly laid down by Lord Hardewicke in Brown v. Heathcote 1st Atk. 160 and 162 and has ever since been adhered to, not only in Courts of equity, but also, as the case of Leslie v. Guthree, 1 Bing, N. C. page 697 abundantly shows, at law, etc."

In re N. Y. Ecom. Ptg. Co. 6 A. M. B. R. 615—110 Fed. 514.

Therefore, we still claim as a matter of fact, and one which clearly appears from the record, taht this property was the

property of the Roanoke Furnace Company when the attachments became liens upon it, and that they only became liens because the Furnace Company failed to have recorded the evidence of its title.

But it is idle to speculate on what would have been the result if proceedings in bankruptcy had been taken at a time when they were not taken.

On the 24th day of December, 1900, when the petition in bankruptcy was actually filed in this case, forty-seven days had elapsed since the deed conveying the Furnace Property to the Furnace Company had been recorded. It is admitted in the agreed statement of facts (see record No. 213, page 10, section 9) that this deed "Was a valid conveyance to a purchaser in good faith for a then fair consideration *and was not affected by the bankruptcy proceedings hereinbefore mentioned.*" And, yet it is gravely claimed that this property was still the property of Baird which would pass to the Trustee of Baird, to be distributed amongst all of his creditors.

We have already undertaken to show that the preference mentioned in section 67c must refer to a preference of one creditor over another in the distribution of the *bankrupt's estate.* The only property which the Bankrupt Law seeks to deal with, is the property of the bankrupt. There is not a single clause or provision in it, which, by the greatest ingenuity, can be twisted into such a construction that it would cover the property of a *bona fide* purchaser for value from the bankrupt. And counsel for the respondent can get no comfort from the fact that, on page 8 of our former brief, we admitted that the bankrupt law was intended to deal with the bankrupt's *creditors.* This is not denied, but, it will be seen that we were careful to state that *the property* that is dealt with, is the estate *of the bankrupt*, and that that with the estate of others than the bankrupt, it was not intended to have anything to do. And we confess that we can see nothing in the brief of counsel for

the respondent which militates against this proposition, but, on the contrary, the whole brief is practically an admission of the truth of our contention as it is based on the assumption that the property in this case, was not the property of the Roanoke Furnace Company, but the property of Baird, the bankrupt, which assumption, as has been shown, is utterly groundless.

It is hardly necessary, but we think it better to state that, counsel for respondent are mistaken in saying that it is conceded by us that the filing of a petition in bankruptcy is in all respects exactly like an attachment. We submit that if counsel had read the entire paragraph, beginning at the bottom of page 7 of our opening brief, it would have been apparent that what we said was intended to show that there was a very decided difference between an attaching creditor under the State laws and a Trustee in Bankruptcy, so far as their right to subject the property of third parties is concerned and one of the main differences, is that a contract for the sale of land if unrecorded is void as against an attaching creditor because made so by our Virginia statute, but is not void as to the Trustee in Bankruptcy who stands only in the position of the Bankrupt as we have already seen.

(2) It is further claimed that the attachments can be avoided under section 67f, the section upon which the District Court and the Circuit Court of Appeals based their decision. We do not consider it necessary to answer, in detail, and at any great length, what is said in regard to this section, because, the opening briefs filed in this case, fully discuss this point. The whole argument of our opponents on this point, practically, amounts to this, that section 67f speaks of liens against a *person* who is insolvent, that therefore it is intended to cover the property of third persons, as well as that of the insolvent, provided the insolvent is a debtor and a party to the proceeding. We submit that, this

is sticking in the bark and that it is not a proper construction of the language of 67f. In the strict sense of the word, there is no such thing as a *lien against a person.* A person is not subject to a lien. It is the *property* of a person that in the eyes of the law, is subject to the lien. And in this connection the attention of the court is called to the fact that, section 67f does not say "liens against a person" but it says "Liens obtained through *legal proceedings against* a person," and it is obvious that the words "against a person" refer to the words immediately preceeding "*legal proceedings*" and not to the word "*liens.*" In this case, it is true that Baird was a party defendent to the legal proceedings in which the attachment was obtained, and in that sense it was against him, but the *lien* of the *attachment* obtained by the proceedings was upon the property which had been sold to the Roanoke Furnace Company, and, which therefore, belonged to that Company and not to Baird.

It is claimed that the facts of this case constitute the only conceivable state of facts to which the language in Section 67f in regard to keeping alive the attachment and subrogating the trustee to the right of the attaching creditor can apply. This is an entirely unwarranted assumption on the part of our opponents. In the great number of States of the Union, there are all kinds of statutes with reference to attachments and other liens and the method of their enforcement. In Virginia, we have a statute which allows you to bring a suit in Equity for the purpose of obtaining an attachment against a non-resident, as was done in this case, and this suit can be brought either on a debt due or to become due and the proceeding is a good one to enforce the lien of the attachment by the sale of property attached, especially in the care of real estate (as in this case.) It is obvious, that it is a benefit to the trustee of the bankrupt representing all the creditors, to be given the power to take advantage of the proceeding in the

State Court, whereby he is furnished a simple method of enforcing his lien. He is thereby given his choice of courts and gets the advantage of the statutes in regard to the enforcing of liens. There may be other reasons assigned equally as good, why this provision is contained in Section 67f and a similar provision in 67c, but the one given, we believe, is sufficient. If not, it is not for us to give reasons for the law. Whatever the reasons, it seems plain to us that this provision can not be construed into giving the Bankrupt Court jurisdiction over the property of others than the bankrupt in the absence of plain language to that effect.

We believe that a careful reading of Section 70a will show that the only property intended to be affected (with the exception of property conveyed away in fraud of creditors) is, that to which the bankrupt has *title*. The words, "by operation of Law," can not be restricted as is sought to be done, to property which would pass without special order of the Court, because these words are used generally and made to cover expressly "property transferred in fraud of his creditors" which can only be recovered by a proceeding in Court.

The discussion on page 14 of our opponent's brief as to the meaning of the word "*prior*" in Section 70a, with all due respect, does not seem to us to require much comment.

It clearly can not mean that a valid *bona fide* conveyance to a purchaser for valuable consideration, can be annulled in favor of the trustee in bankruptcy, because, forsooth, the deed is made within the four months period prior to the bankrupt proceedings; and yet this is the logical result of our opponent's reasoning.

It is not considered necessary, nor would it, we think, be profitable to pursue this subject further, but we rely on what has been said in our former brief to show that Section 67f is not broad enough to reach the case now under consideration.

We respectfully submit that the judgment of the Circuit Court of Appeals should be annulled; that your petitioners should be given the full benefit of the liens of their attachments.

Respectfully Submitted.

HOLMES CONRAD,
WILLIAM GORDON ROBERTSON,
EDWARD W. ROBERTSON,
of Counsel for Petitioners.

FILE COPY

Supreme Court of the United States

October Term, A. D. 1925

FIRST NATIONAL BANK OF BALTIMORE
PETITIONER,

vs. No. 213

WM. H. STAAKE, TRUSTEE, RESPONDENT.

HENRY E. McHARG, RECEIVER, ET
ALS., PETITIONERS

vs. No. 214

WILLIAM H. STAAKE, RESPONDENT.

Petition for Rehearing

S. HAMILTON GRAVES,
Counsel for Petitioners.

PETITION FOR REHEARING.

October Term, 1905.

IN THE SUPREME COURT OF THE UNITED STATES.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs. **No. 213.**

WM. H. STAAKE, TRUSTEE, RESPONDENT.

BY MENRY K. McHARG, RECEIVER, ET. ALS. PETITIONER,

vs. **No. 214.**

WM. H. STAAKE, TRUSTEE, RESPONDENT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The said First National Bank of Baltimore, and Henry K. McHarg, Receiver et. als., Petitioners, come now and respectfully petition this Honorable Court for a rehearing of said causes, for the following reasons, to wit:

The opinion of the court in these causes establishes the following propositions of law:

(1) That under Sec. 67-f. of the Bankruptcy Act of

1898, if a creditor through legal proceedings to which his insolvent debtor is a party acquires a lien under the state law upon the real estate of a third party, but which can be treaetd by **the attaching creditor only** as the property of the insolvent, and within four months of the acquisition of the lien, a petition in bankruptcy is filed against the insolvent debtor, the filing of the petition annuls the lien and the property affected thereby is discharged therefrom.

(2) That the Bankrupt Court may by virtue of said Section (67-f.) order that the right acquired by such lien shall be preserved for the benefit of the bankrupt's estate; and thereupon so much of the value of the attached property as is represented by the lien passes to the trustee of the bankrupt for the benefit of the general creditors.

(3) That if a creditor of an insolvent debtor acquire a lien by attachment within four months of the filing of a petition in bankruptcy against his debtor, upon property in which the bankrupt has no semblance of interest or estate, but which under the law of the state in which it is located, because of a policy of its own, is treated **as to the attaching creditor only,** and to the extent of the lien only, as property of the bankrupt, that then by virtue of said Sec. 67-f. such lien is to be reckoned as a part of the bankrupt's estate and passes to the trustee of such estate as a part thereof.

By the construction given to Sec. 67-f. it exceeds the power delegated by the grant.

By the 4th clause of § 8 of Art. 1 of the Constitution power is vested in Congress,—"To establish * * * * * uniform laws on the **subject of bankruptcies** throughout the United States" under the construction given 67-f. the same is unconstitutional and void for the following reasons, because:

(1) Laws on the "subject of bankruptcies" within

the meaning of the Constitution are those laws, and those only, which deal with the **person or estate, or both, of a bankrupt:**

(a) The estate or property of a bankrupt is such, and such only, as is his estate or property under the law of the state. It is not within the province of Congress under the power granted to change the state laws of property, therefore it cannot **reckon as property of a bankrupt** that which is not reckoned as his property quoad all of his creditors under the state laws.

(b) Under the power granted, Congress cannot by legislative fiat annul a lien obtained under a state law, save and except such lien be upon property which under the state law is the property, or is treated as the property, of the bankrupt and such as **all of his creditors** can subject.

(c) Under the power granted, Congress cannot create an asset for the general creditors by appropriating a lien of an individual creditor, which is upon property in which the bankrupt had no **beneficial interest** and which the **general creditors** could not subject under the state laws. It is not within the power granted, to take the property of one and give it to another.

And your petitioners pray, therefore, that an order may be made for a rehearing of the arguments in these causes, on a day to be appointed by this Court; and that they be permitted to file briefs upon the propositions above stated and upon such other points as the Court may direct.

First National Bank of Baltimore.

Henry K. McHarg, Receiver, et. als.

By Counsel, S. HAMILTON GRAVES, P. P.

Wm. G. Robertson
E. W. Robertson } of Counsel.
Holmes Conrad

I, S. Hamilton Graves, a practicing attorney in the Supreme Court of the United States, do hereby certify that in my opinion a rehearing should be granted as asked for in the foregoing petition and upon the grounds therein stated, and that decrees should be entered giving to the petitioners the benefit of their attachment liens.

Given under my hand this 18th day of May, A. D. 1906.

S. HAMILTON GRAVES.

BRIEF FOR PETITIONER

ON

APPLICATION FOR REHEARING.

Limited time prevents the doing of more than stating in the briefest manner our views on the questions presented by the foregoing petition.

Congress, in passing laws on the subject of bankruptcy, is restricted by the terms of the grant.

The first question presented therefore, is, what are "Laws on the subject of bankruptcies"? The term "Subject of bankruptcies" has not been directly defined by this court, but the limitations upon Congress have been, by the approval in the case of Hanover National Bank vs. Moyses (186 U. S., 185; 46 Law Ed., 1118) of the opinion of Mr. Justice Catron in the case in Re. Klein, in which when discussing the constitutional provision for a National Bankruptcy Act said:

> "In considering the question before me, I have not pretended to give a definition (but puposely avoided any attempt to define) the mere word 'bankruptcy'. It is employed in the Constitution in the plural, and as part of an expression, 'the subject of bankruptcies.' The ideas attached to the word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is,—**To what limits is this jurisdiction restricted? I hold,** it extends to all cases where the law causes to be distributed **the property of the debtor** among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject,—distribution and discharge—are in the competency and discretion of Congress."

Mr. Justice Story when discussing the subject of Bankruptcy and insolvency, (Story on the Constitution Vol. 2—§ 1106. 5th ed.) said:

> "That the general objects of all bankrupt and insolvent laws is, on the one hand to secure to creditors an appropriation of the property of their debtors pro tanto to the discharge of their debts whenever the latter are unable to discharge the whole amount: and on the other hand to relieve etc."

Mr. Justice Field, in United States vs. Fox. (95 U. S. 670 24 L. ed. 539) said.

> "There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. And as it is authorized 'To establish uniform laws on the subject of bankruptcies throughout the United States.' It may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property."

What are bankrupt laws within the meaning of the Constitution has been much discussed, but we have been unable to find in either text book or report, that a law on the subject of bankruptcies dealt with property other than that of the bankrupt. And we submit that in so far as it deals with property, a law on the subject of bankruptcies in the sense of the Constitution, is a law which provides for the disposition of a bankrupt's estate, **and his estate only.**

II

The estate or property of a bankrupt is such, and such only, as is his estate or property under the law of the state. It is not within the province of Congress under the power granted to change the state laws of property, therefore it cannot reckon as property of a bankrupt that which is not reckoned as his property quoad all of his creditors under the state laws.

The soverignty over property, always claimed and often exercised by governments and rulers is a subject of historical research which my capacity would not allow me to attempt if thought pertinent here. Kings exercised the right to give and take away property at their will, and out of this grew the struggles of the Revolution, which transferred the soverignty from the Crown to the individual states, this in turn became vested in the people of the states. Then a Federal Constitution was framed and adopted for specified purposes, and the powers granted to the "United States" specifically enumerated. The tenth amendment to the Constitution provides that: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

"The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication." Per Marshall, Ch. J., in Martin vs. Hunter's Lessee, 1 Wheat. 304, 326.

The residuary powers of legislation are in the states and extend to all persons and things within their territory and limits.

Among these powers are those relating to internal affairs, the power to regulate transfers of property within state limits to declare the effect of titles to land and to regulate the tenure of property, its acquisition, rule of descent, and extent of testamentary dis-

position. The right to exercise such power is foreign to the purpose for which the Federal Government was created, and was not delegated to it. Mr. Justice Field in U. S. vs. Annie Fox, 94 U. S. 315, 24 L. ed. 192, in discussing this subject said:

> "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick vs. Sullivant, 10 Wheat., 202. The power of the state in this respect follows from her soverignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the state, whether **inter vivos** or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the state."

Authority to pass laws on the subject of bankruptcies, unquestionably does not expressly give authority to repeal or modify the property laws of a state. It is within the power of Congress to modify such laws to the extent, and no further, that such action may be necessary and proper to carry out or exercise the power expressly conferred. If as we contend, the power expressly conferred is limited to the administration of the estate of a bankrupt, then the power to modify

or annul the state laws of property is confined to those which effect that estate. If Congress is without authority to repeal or modify the state laws of property, it from necessity follows, that property which under the law of the state belongs to one party, cannot by virtue of an act of Congress be reckoned as the property of another.

III

Under the power granted, Congress cannot by legislative fiat annul a lien obtained under a state law, save and except such lien be upon property which under the state law is the property of, or is treated as the property of the bankrupt, and such as all of his creditors can subject.

That Congress has power to declare void liens which may have been procured by a creditor of the bankrupt upon the property which it has power to administer, is not here questioned, but under the power granted it cannot declare void a lien acquired by a creditor of a bankrupt, save and except such lien be upon the estate of the bankrupt. The jurisdiction is limited to the administration of that estate. Of what that estate consists can be determined only by the law of the state. To what extent a creditor of a bankrupt may effect or subject the property of a third party is no concern of Congress. Whatever may be the restrictions which may be imposed upon the creditor of a bankrupt, they cannot be extended further than his acts may effect the estate of the bankrupt. By no reasonable construction of the power granted can it be said that Congress has a right to declare, that upon the filing of a petition in bankruptcy against an insolvent, that eo instanti every lien which may have been acquired by a creditor through legal proceedings to which the insolvent was a party shall be void. The power to administer the property of one class does not give power to destroy the vested rights of others

who occupy no other relation than that of creditors, and who by the acquisition and enforcement of their liens do not interfere with the property which is being administered.

The power to annul liens upon specific property does not give the right to annul those upon all property. If Congress can annul liens which are upon the property of third parties, then it has the right to administer such property. No power is vested in Congress to impose a penalty upon the creditor of a bankrupt for the sole reason that he is such creditor. It is not within the power of Congress to legislate upon the rights which may exist as between the creditor of a bankrupt and third parties. Congress cannot by legislative fiat, annul a lien obtained under the said law, if such lien does not effect property which Congress is authorized to administer.

I submit that no such power over a creditor of a bankrupt was delegated to Congress, and therefore, it does not exist

IV

Under the power granted Congress cannot create an asset for the general creditors by appropriating a lien of an individual creditor, which is upon property in which the bankrupt had no **beneficial interest** and which the **general creditors** could not subject under the state laws. It is not within the power granted to take the property of one and give it to another.

All creditors have an interest in the property of their common debtor, but one creditor has neither equity or interest in the property of another creditor. The liens in the case at bar are the property of petitioners under the state law, and are upon property in which neither the bankrupt nor his general creditors had any vestage of interest or estate under the state law. The difference in appropriating a lien which is upon a bankrupt's property, in which all of his credi-

tors have an interest, and in appropriating one which is upon property in which neither he nor they have an interest is apparent. In the one case Congress is exercising its power to administer the estate of a bankrupt; in the other, it is by legislative fiat creating a property right. It is taking the property of one and giving it to another. No such power anywhere exists in this Republic.

"There is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment." Cooley's Constitutional Limitations 7th ed. P. 507.

Mr. Justice Patterson in Vanhorne vs. Dorrance (2 Dall. 304; 1 L. ed. 391) when discussing the validity of an act of the legislature of Pennsylvania which in effect seized the property of one and gave it to another, said:

> "The English history does not furnish an instance of the kind; the Parliament with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution."

The appropriateing of a lien for the benefit of the general creditors to the detriment of the owner of that lien, when the same is upon the property of a party other than the bankrupt, is the exercise by Congress of unauthorized power and not of right. The Constitution does not empower Congress to act without limitation over persons and property. Congress is only invested with limited powers over persons and things, for the purpose of exercising the defined powers delegated to it. Sec. 67-f. as construed, is an encroachment upon a sacred and fundamental right, a right inherent and unalienable.

It is most respectfully but earnestly submitted, that a rehearing should be granted in these causes, that if the construction heretofore given said section be adhered to, that then and in that event, the same be by this Court decreed unconstitutional and void.

Respectfully submitted,

S. HAMILTON GRAVES,

Counsel for Petitioners.

Supreme Court of the United States.

213 & 214.

Nos. 583&584.

No. . October Term, 1904.

Ex Parte First National Bank of Baltimore, Md.

No. . October Term, 1904.

Ex Parte Receivers of the Virginia Iron, Coal and Coke Company.

Answer of William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, to the Petitions of First National Bank of Baltimore, Md., and Receivers of the Virginia Iron, Coal and Coke Company for Writs of *Certiorari* requiring the Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court of the United States, for its Revision and Determination, Writs of Error taken by said Petitioners.

H. GORDON McCOUCH,
S. & M. GRIFFIN,
SAMUEL W. COOPER,
JOHN DICKEY, JR.,
ARTHUR G. DICKSON,
For Respondents.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904. No. .

First National Bank of Baltimore, Md., Petitioner,

vs.

William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent.

October Term, 1904. No .

Receivers of the Virginia Iron, Coal and Coke Company, Petitioner,

vs.

William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of William H. Staake, trustee of C. R. Baird & Co., bankrupts, respectfully shows:—

Both of the above petitions present the same question and are practically in the same language. Both admit that these are the only cases of the kind which have arisen under the Bankruptcy Act, and in making that admission the petitioners show they should not be allowed the writs

for which they pray. The decisions of the Circuit Courts of Appeals were intended by the Bankruptcy Act to be final, and it is only where the question involved is a Federal one or where its determination is essential to the uniform construction of the Bankruptcy Act that an appeal from the final decisions of the Circuit Courts of Appeals will be allowed. No Federal question is involved in the present cases. The petitioners have endeavored to raise the ground of uniformity of construction as the reason for granting them special appeals in these cases. The admitted fact, already referred to, that in almost seven years of the Bankruptcy Act and under the previous Acts that have been in force in the United States this is the only question of the kind which has arisen ought to be sufficient to show this Honorable Court that these are not cases in which special appeals should be allowed, but in order to escape this obvious objection to their right to appeal, the petitioners point to an incidental part of the decision and urge that the Circuit Court of Appeals for the Fourth Circuit as to that is in conflict with other Circuit Courts of Appeals.

On behalf of the trustee of C. R. Baird & Co., bankrupts, it is urged that a difference of opinion between Circuit Courts of Appeals as to incidental questions does not afford a reason for granting special appeals, and further it is denied that as to this incidental question, there is any conflict of decision. What constitutes a preference has been definitely determined, and the decisions relied upon by the petitioners as being in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit, were called to the attention of that court when these cases were argued before it.

The contention of the petitioners is that the Circuit Court of Appeals for the Fourth Circuit has in these cases decided that a lien which does not bind the property of a bankrupt can work a preference in favor of its holder over his other creditors, and that it should, therefore, be declared void. This contention is inaccurate in two respects. Both the District Court and the Circuit Court of Appeals based their decision upon the

language of section 67*f*, the District Court saying that the section "exactly fits the case," and the Circuit Court of Appeals saying "There is therefore in the facts of this case a literal gratification of the words of this section." In answer to the contention that section 67*f* is confined to liens which create a preference, that these liens were not preferences, and that, therefore, they could not be annulled under that section, the district judge, while stating that he could not see why the enforcement of these liens would not give the creditors who held them a preference, further said that section 67*f* was not confined to liens that create a preference, "its language expressly embraces all liens as were the liens in the case at bar." The Circuit Court of Appeals held that the contention that the exception in the latter part of the clause of 67*f* can have reference only to liens on property which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien, would narrow the more obvious meaning of the words. The Circuit Court of Appeals further held that it was only because the property attached by the creditor remained *quoad* the attaching creditor the property of the bankrupt that the attachments were liens at all. It will be observed, therefore, that neither in the decision of the District Court nor of the Circuit Court of Appeals was it asserted that the liens were void because preferential, the result being reached because of the express language of section 67*f* of the Act; nor was it asserted that a lien upon property of one other than the bankrupt could create a preference in favor of the creditor who held the lien, the property in question being treated as the property of the bankrupt, at least so far as the attaching creditors were concerned.

It therefore appears that there is no conflict between the decision in these cases and that of other Circuit Courts of of Appeals, either upon the facts involved, since there has never been any other case of the kind, nor upon any of the principles which led to the decision. The cases were ably contested by counsel for the petitioners in both the District Court and the Circuit Court of Appeals, and every-

thing asserted in the petitions was called to the attention of both of those courts. It is respectfully submitted that the decision in these cases is amply justified by the opinion written by his Honor, Judge Morris.

For convenience of reference there is attached as an appendix hereto the opinion of Judge McDowell, of the United States District Court (as reported in 11 A. B. R., 435), and the opinion of Judge Morris, of the Circuit Court of Appeals, more legibly printed than in the Record.

The analysis which we have given of the decision in these cases further shows that there is no conflict between the views expressed by the District Court and the Circuit Court of Appeals for the Fourth Circuit and those of your Honorable Court as set forth in the cases cited by the petitioners. The three reasons asserted by the petitioners in their brief, in support of their request for special appeals, are reducible to one, which is shown to be of no validity when the real point of the decision in these cases is considered.

It is submitted, therefore, that nothing has been alleged in the petitions which takes these cases out of the ordinary rule that the decisions of the Circuit Courts of Appeals shall be final in bankruptcy matters.

For these reasons this court is respectfully asked to dismiss the petitions and to decline to grant the writs of *certiorari* prayed for.

H. GORDON McCOUCH,
S. & M. GRIFFIN,
SAMUEL W. COOPER,
JOHN DICKEY, Jr.,
ARTHUR G. DICKSON,
For Respondents.

APPENDIX.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

McDOWELL, J.:

C. R. Baird, who did business under the name of C. R. Baird & Co., was the owner of certain real estate situated in this district, known as the "West End Furnace property."

On December 7th, 1899, Baird, by written contract, sold the furnace property to the Roanoke Furnace Company, in consideration of the issue to Baird of certain shares of the vendee's capital stock and the assumption by the vendee of a purchase money debt owing on the furnace by Baird to R. E. Tod. This contract was never recorded. On November 5th, 1900, Baird executed and delivered to the Roanoke Furnace Company a deed in pursuance of the above-mentioned contract conveying the furnace property, which deed was forthwith recorded.

Between October 12th and 31st, 1900, at which time Baird was insolvent, some of Baird's creditors sued out from the Corporation Court of the City of Roanoke, Virginia, attachments which were levied on the above-mentioned properties.

On December 24th, 1900, other of Baird's creditors filed in the District Court for the Eastern District of Pennsylvania, a petition in bankruptcy against him. In due course that court adjudicated Baird a bankrupt. Early in the course of this proceeding ancillary jurisdiction was taken of the cause by this court.

The above-mentioned property has been sold by order of court, and the proceeds are deposited to await the determination of the questions hereinafter discussed.

By the registry statutes of this State unrecorded contracts of sale and conveyance of real estate are void, at least as to lien creditors.

The question here is presented by a petition filed by Staake, trustee, praying that the attachments above-mentioned be declared void as regards the creditors who sued them out, but preserved for the benefit of Baird's estate; and by a demurrer to this petition filed by the attaching creditors.

At the hearing all objections to the jurisdiction of this court were withdrawn, and jurisdiction is taken by express consent of all parties.

The demurrer to the petition is intended to raise merely the question as to whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

By 67*f* of the bankrupt law (Act of July 1st, 1898, Ch. 541, 30 Stat. 565 [U. S. Comp. St., 1901, page 3450]), all attachments obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt; and the property affected by the attachment shall be deemed wholly discharged and released from the same and shall pass to the trustee as part of the estate of the bankrupt, unless the court shall on due notice order that the right under such attachment shall be preserved for the benefit of the estate. In the case at bar the attachments were obtained through legal proceedings against Baird, within four months of the filing of the petition against him, and he was insolvent at the time. The language of this section so exactly fits the case we have here that some cogent reason must be found before we can properly hold that it does not apply.

Counsel for the attaching creditors, in an unusually excellent argument, take the position that the case at bar is not within the intent of the bankrupt law. They argue that it is so unjust and inequitable to take from the attaching creditors the fruits of their diligence and give

them to all the creditors *pro rata*, that Congress could not have intended the Act to apply in a case such as we have here. Nevertheless, counsel for these creditors necessarily admit that if Baird had never conveyed the furnace, or if his grantee had never recorded the deed, or if Baird had made a fraudulent conveyance, the Act plainly takes from the attaching creditors the fruits of their diligence and gives them to all the creditors *pro rata*. The argument that the law is unjust or inequitable is certainly as strong in any of the three supposed cases as in the case at bar. While the State law gives to diligent creditors who attach a priority of payment—a preference—over those who do not attach, it is beyond dispute that the intent of the bankrupt law (except as to rights gained more than four months before the filing of the petition in bankruptcy) is just the reverse. The intent of the latter, except as aforesaid, is to *pro rate* all available assets and to prevent any priority of payment being obtained by any creditor within the four months, whether by consent of the debtor or by the diligence of the creditor. Such being the intent of the law, it seems to me that the argument based on the supposed injustice of the Act as applied to case at bar is not of weight. Such being the intent of the law, it would be surprising if Congress had omitted to provide for the not uncommon state of facts which we have here. And, as above remarked, the language of 67*f* seems entirely adapted to the case we have here, as well as to other possible cases. In cases where the title to the attached property remains in the bankrupt, the liens of attaching creditors are simply annulled and the proceeds of the property are divided *pro rata* among all the creditors. In cases where the bankrupt has made a fraudulent conveyance, this deed is by proper proceeding set aside, the attachments are annulled and the proceeds of the property are *pro rated* among all the creditors. In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the

liens of the attaching creditors for the *pro rata* benefit of all the creditors.

It is further argued that the case at bar is not within the intent of the Act, because the right here contended for by the trustee is not mentioned in section 70*a* of the Act. (30 Stat., 565 [U. S. Comp. St., 1901, page 3451]). This argument does not seem to me to be of force. Section 70*a* is an enumeration of those properties the title to which passes to the trustee by operation of law. The right here asked for by the trustee can be given him only by order of court. It would have been inconsistent, even absurd, to have provided in 70*a* that the rights of attaching creditors in a case such as we have here, shall vest in the trustee by operation of law, when it had been provided in 67*f* that such rights should be vested in the trustee by order of court.

It was further argued that the power to preserve and enforce liens for the benefit of all the creditors is given only as to liens that may be annulled under 67*f*, that only liens which give a preference are thus to be annulled, and that the liens here do not give a preference. While the argument is ingenious I can not assent to its soundness. If the attaching creditors are allowed to have the exclusive benefit of their liens I do not see why they are not in effect allowed a preference. In such event they will be paid in full, while the other creditors will receive only a small proportion of their claims. Again, 67*f* is not confined to liens that create a preference. Its language expressly embraces all liens obtained as were the liens in the case at bar.

Considerable effort was expended in argument on the proposition that an unrecorded contract of sale or deed is made void by the Virginia statutes only as to lien creditors, and that, even if there were doubt about this as a legal proposition, clause 9 of the agreed facts in effect so states. I see no necessity of discussing these questions. If it were admitted that the right contended for by the trustee had to be found in 70*a* before such right could be given him, this point might

be of considerable interest. But, as above stated, this right could not properly have been mentioned in 70*a*. The power of the court, and indeed, its duty, to take away from the attaching creditors the benefit of their liens and give it to the trustee is found specifically in 67*f*. To thus construe this section is in line with the undoubted policy of the Act; and its language is so sweeping and general, that I am constrained to believe that had Congress not intended such cases as we have here to fall within its purview, some specific provision would have been made excepting such cases.

So far as this branch of the case is concerned, I am of opinion that an order should be made subrogating the trustee to the rights of the attaching creditors in the fund derived from the sale of the furnace property.

* * * * * * *

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

NOVEMBER 15th, 1904.

MORRIS, District Judge.

The facts in these proceedings have been agreed upon, and are as follows:—

Chester R. Baird, trading as C. R. Baird & Co., on December 7th, 1899, owned certain real estate in Virginia, known as the West End Furnace Property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing incumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to wit, shares amounting to $500,000 of the capital stock of the said Roanoke Furnace Company.

Under the contract of sale the Roanoke Furnace Company took immediate possession, in December, 1899, of the property so purchased, but no deed to the company was executed by Baird until November 5th, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000, against Baird as a non-resident of Virginia were issued at the instance of certain of his creditors, and were levied upon the furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon.

(Code of Virginia, 1887, sections 2463, 2464, 2465, 2472.)

Within four months from the levying of the attachments, to wit, on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Penn-

sylvania, and he was adjudged a bankrupt, and on January 2d, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29th, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26th, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29th, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

Under orders of court the property conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom and all these claims were submitted to the determination of the court below by express consent of all the parties.

Upon the issues made by the petitions and answers the court below ruled that the attachments against Baird, having been obtained through legal proceedings against him, when he was insolvent and within four months prior to the filing of the petition in bankruptcy against him, were null and void under section 67*f* of the Bankruptcy Act of 1898, so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the benefit of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate, and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings interfered. * * *

Section 67*f* provides:—

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who

is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent, and that the court has on due notice ordered that the right under the attachments shall be preserved for the benefit of the estate and pass to and be preserved by the trustee for the benefit of the estate. There is therefore in the facts of this case a literal gratification of the words of this section. It is contended, however, that as the first clause of the section makes null and void the liens therein mentioned and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of the clause of 67*f* can have reference only to liens on property, which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.

We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property,

which would not, if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee.

A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors does produce equality and prevent preferences.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. This distinction is clearly stated in the following citation from *In re* New York Economical Printing Company, 110 Fed. Rep., 514, quoted by the Supreme Court of the United States in Hewit *vs.* Berlin Machine Works, 194 U. S., 302: "The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present Act, like all preceding Acts, contemplates that a lien good at that time as against the debtor and as against all his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the Act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In the present case the sale by the bankrupt was void as against attaching creditors for want of a recorded deed. The property was levied upon by creditors, and by virtue of the attachments might have been sold under judicial process against the bankrupt. The levy was within four months of the filing of the petition in bankruptcy, and under section 67*f* the lien is preserved for the benefit of his estate. In the case of *In re* New York Economical Printing Co., above cited, Judge Wallace, speaking of the right of trustee in bankruptcy to treat as invalid a chattel mortgage which was not filed in compliance with the

laws of New York, and which, under the decisions in that State, could be treated as invalid only by creditors who had obtained judgments and acquired a lien, proceeded further to say: "Subdivision b, section 67 (Act of 1898), preserves for the benefit of the estate in bankruptcy a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor by an execution or a creditor's bill has secured a legal or equitable lien upon mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien would inure to his own exclusive benefit; but if acquired at any time within the four months it would be null and void under subdivision 'f' of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision 'b.'"

It is urged that by giving to the trustee of the bankrupt's estate the benefit of the attachments the court is taking from the attaching creditors property which did not belong to the bankrupt, and could not have passed to his trustee, but which was a right which the law of Virginia, because of a policy of its own, gave to the creditors in a property which did not in fact belong to the bankrupt.

We think that the Virginia law may well be considered as giving the right to the attaching creditor because *quoad* the attaching creditor the law regards the property so attached as to that extent still remaining the property of the bankrupt because of the want of a proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird that the attachments are liens at all.

We consider the language of section 67*f* so mandatory and imperative that we arrive at the conclusion that the ruling of the court below must be sustained.

* * * * * * *

Purnell, District Judge, dissents.

IN THE SUPREME COURT OF THE UNITED STATES.

First National Bank of Baltimore, Petitioner,

vs.

William H. Staake, Trustee of C. R. Baird & Company, Bankrupt, Respondent.

October Term, 1905.

No. 213.

Receivers of Virginia Iron, Coal & Coke Company, Petitioners,

vs.

William H. Staake, Trustee of C. R. Baird & Company, Bankrupt, Respondent.

October Term, 1905.

No. 214.

ON WRIT, OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PAPER BOOK OF RESPONDENT.

STATEMENT OF FACTS.

From the agreed statements of facts it appears

That on December 7th, 1899, Chester R. Baird entered into an agreement of sale with the Roanoke Furnace Company, by virtue of which he agreed to convey to it a certain furnace property near Roanoke, Virginia, known as the West End Furnace property;

That during October, 1900, certain creditors of Chester R. Baird caused attachments to be issued against him and levied on the property of the said C. R. Baird in the City of Roanoke, Virginia, known as the West End Furnace property, the attachments amounting to something over $40,000.;

That at the time the attachments were levied, Baird and the Furnace Company were both insolvent;

That on November 5, 1900, Baird executed and delivered, for a then fair consideration, a deed for the furnace property to the Roanoke Furnace Company, which deed was recorded on November 7th, 1900;

That on December 24th, 1900, a petition in bankruptcy was filed against Baird in the District Court of the United States for the Eastern District of Pennsylvania, upon which he was subsequently adjudicated a bankrupt, and William H. Staake, the respondent, was duly elected trustee and qualified as such. On December 29th, 1900, a petition in bankruptcy was filed against the Roanoke Furnace Company, which was subsequently adjudicated a bankrupt. Ancillary jurisdiction of both estates was also assumed by the District Court of the United States for the Western District of Virginia.

It further appears from the record

That Baird's trustee filed a petition asking the District Court for the Western District of Virginia to adjudge the liens of the attaching creditors null and void in their hands, but that they should be preserved for the benefit of the estate;

That the District Court for the Western District of Virginia decreed that the rights of the attaching creditors should be preserved for the benefit of Baird's estate and subrogated his Trustee to their rights, authorizing him to enforce the attachment liens with like force and effect as the attaching creditors might have done had not bankruptcy proceedings intervened;

That an appeal was taken from the decree of the District Court for the Western District of Virginia to the Circuit Court of Appeals for the fourth circuit, which affirmed the order of the District Court, and from the decision of that Court the matter has been brought before this Court upon writs of *certiorari*.

QUESTION INVOLVED.

The question for the consideration of this Court is whether a creditor who levies an attachment on property of an insolvent debtor, within four months of the petition on which the debtor is adjudged a bankrupt, can retain the fruits of the attachment for himself alone or must permit the general creditors of the bankrupt to share therein.

ARGUMENT.

It is proposed in this argument to deal with the question above stated under two heads, and to show

1. That the attaching creditors obtained by their attachments preferential liens, whose dissolution would militate against the best interests of the estate, and, therefore, that the trustee should be subrogated to their rights thereunder, in accordance with the provisions of Section 67*c* of the Bankruptcy Act.

2. That the attachments of the petitioners were void under the provisions of Section 67*f* of the Bankruptcy Act, but should be preserved thereunder for the benefit of the estate.

1. The question of preference must be determined at the time and under the circumstances under which it is obtained. Prior to the recordation of the deed of conveyance by Baird to the Roanoke Furnace Company, on November 7, 1900, the premises which were the subject matter of the attachments were, under the laws of Virginia, open to attachment by all creditors of Baird. The attaching creditors enforced this general right by issuing their attachments against the property of Baird, at a time when he was admittedly insolvent and within four months of the filing against him of the petition upon which he was subsequently adjudged a bankrupt. The enforcement of said attachments for the benefit of the attaching creditors would have resulted in the payment in full of the claims of said creditors, out of the proceeds derivable from a sale of the attached premises, and, therefore, preferences were then obtained. It is submitted that no subsequent transfer by Baird to any person whatever, for any consideration, however fair, nor any other act by either Baird or the Roanoke Furnace Co., could validate the attachments and purge their preferential taint.

If a petition in bankruptcy against Baird had been filed on the day immediately succeeding the levying of the attachments, the preferences would have been stricken down by the plainly expressed words of the act. That the filing of a petition in bankruptcy is, in effect, an attachment levied in behalf of all the bankrupt's creditors, seems to be conceded in the Brief filed on behalf of the Receivers of the Virginia Iron, Coal & Coke Company, at the bottom of page 7. It necessarily follows that if a petition in bankruptcy had been filed immediately after the levying of the attachments and before the delivery and recording of the deed, the Trustee

could have successfully nullified the otherwise legal effect of the unrecorded contract of sale, and he would have done so not through the rights of the grantor, but by virtue of the rights of the general creditors vested in him by operation of the Bankruptcy Act. It must be evident, therefore, that the attaching creditors were not then in a class distinct from the general creditors nor possessed of any rights superior to those of the Trustee in bankruptcy, as is now contended by them.

It will be remembered that at the time the attachments were levied, Baird was, admittedly, insolvent. He might have filed a voluntary petition in bankruptcy for the benefit of all his creditors, as the result of which the whole of the West End Furnace property might have been administered as a part of his estate; for the Roanoke Furnace Company, while perhaps not in collusion with Baird to enable him to defraud his creditors, by its failure to record the contract of sale for almost an entire year, left in him, during that period, the record title of the furnace property and impliedly agreed that that property should be subject to the attack of any of his creditors who might levy attachments upon it.

Baird, however, did not file a voluntary petition in bankruptcy. On the contrary, while thus insolvent and after the levy of these attachments upon the real estate standing upon the record in his name, he executed and delivered a deed of conveyance for that property to the Roanoke Furnace Company, and the effect of that transfer, being for an admittedly then fair consideration and not subject to avoidance by Baird's trustee, was the more surely to prefer the attaching creditors and, if their contention be correct, to prefer them so safely that the Bankruptcy Court cannot now deprive them of said preferences but must admit that, by the giving and recording of the deed, at a time when Baird was insolvent and within four months of the filing of the petition against him, the matter was removed from its jurisdiction and beyond the reach of its grasp. But the deed of conveyance having been delivered on No-

vember 5, 1900, subsequent to the levy of the attachments, "for a *then* fair consideration" (Record, No. 213, p. 12, section 9), the consideration received by the insolvent Baird, for the property attached, whatever its amount, must have been diminished by the exact amount of the claims sought to be recovered by the attaching creditors, and thus, in legal effect, Baird's conveyance was the specific application by an insolvent debtor of a part of his property to pay in full the claims of a few creditors, in fraud of the Bankruptcy Act, and the enforcement of those attachments would work preferences in their favor over his other creditors.

As the facts in these cases have been agreed upon and, therefore, admit of no dispute, it should hardly be necessary here to do more than to call attention to the point that in both Briefs submitted by the petitioners there are assertions not warranted by those agreements. For example, in the Brief of the Receivers of the Virginia Iron, Coke and Coal Company, it is asserted that the attachments were against the property of Roanoke, whereas in the agreement it was stated that the attachments were against the estate of Baird (Record No. 214, p. 17, Sec. 8); in that of the Bank of Baltimore, it is claimed that the property of Baird was parted with at the time of the contract of sale, for a fair consideration and without diminution because of the attachment, whereas in the agreement it was stated that the deed of November 5th, 1900, was a valid conveyance for a *then* fair consideration (Record No. 213, p. 12, Sec. 9). If it were permissible to go outside of the agreed facts in this way, the Trustee might assert, as is the real fact, that the full consideration mentioned in the agreement of sale was not received by Baird, for Roanoke Furnace Company did not discharge the encumbrances then existing and assumed by it, while Baird had to pay on its behalf Eighty five thousand dollars ($85,000.) to Tod, the original owner of the property, on account of his reserved vendor's lien. This money was never repaid to Baird

but the property charged with the attachments and with Tod's lien, thus reduced to Forty thousand dollars ($40,000.), was conveyed by the deed of November 5th, 1900, for "a then fair consideration," as is said in one of the agreements, or for "the consideration therein named," as is stated in the other. The arguments based on the supposition that the amount of the attachments would be realized by these creditors out of Roanoke's estate, as a penalty for its failure to record the contract of sale, and not out of Baird's estate, are thus seen to have no weight in the light of the real facts or of those which have been agreed upon by the parties. There is nothing in those agreements, it is submitted, that conflicts with the actual facts or justifies the petitioners in asserting that the full consideration named in the agreement of sale was paid by Roanoke, either at the date of the agreement or on that of the deed. The fair inference from the language of the agreed statements of facts is that, on the date of the deed, a consideration, then fair in view of all the circumstances, was paid.

By section 67*c* of the Bankruptcy Act it is provided as follows:—

> "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference * * * ; or if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee,

with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

In the present cases it appears that liens were obtained and permitted by legal proceedings against a person within four months of the filing of the petition in bankruptcy against him, while the defendant was insolvent, and that their existence and enforcement will work preferences. It further appears that the dissolution of the liens would militate against the best interests of such insolvent's bankrupt estate and, therefore, it is submitted that his trustee, for the benefit of the estate, is entitled to be subrogated to the rights of the attaching creditors and to perfect and enforce the same in his name as trustee. The contention of the Trustee may be made more clear by the following simple illustration:—

If A, the insolvent owner of property, worth $10,000, having agreed to sell the same to C, learns that his creditor, B, has attached the property for a $5000 debt, and thereafter conveys the title to C, for $5000 in cash, within four months of the filing of a petition in bankruptcy upon which he is subsequently adjudicated a bankrupt, then B has received a preference if he is allowed to enforce his lien against the property in the hands of C, and the property of A, not that of C, has been used to make the payment to B, one-half of its value being diverted for that purpose from the payment of the claims of other creditors of A. In such a case, it is clear that the provisions of Section 67*c* would be applicable.

If the attaching creditors in the prosecution of their attachments had carried the matter to judgment and execution thereon, and a sale had been advertised to take place on December 26th, 1900, could not the petition in bankruptcy, which was filed on December 24th, have alleged those facts as constituting an act of bankruptcy? The petition would have recited that, at a time when Baird was insolvent, he had suffered or had permitted certain creditors to obtain preferences through legal proceedings, to wit, attachments, and that a sale was advertised to take place on December 26th and that Baird

had not, at least five days prior thereto, discharged said preferences. Could Baird have been heard to deny that the property upon which the attachments had been levied was not his property, although it was just because the record title to the property had remained in him that the creditors were able to levy their attachments upon it? If these facts would have constituted an act of bankruptcy on the part of Baird, then, clearly, the relief asked for by the Trustee in these cases was properly granted.

2. These cases have, however, been correctly decided under section 67*f* of the Bankruptcy Act by the District Court and the Circuit Court of Appeals.

It was admitted in the agreed statements of facts that the attachments were liens obtained through legal proceedings against a person who was insolvent and within four months prior to the filing of the petition in bankruptcy against him, upon which he was subsequently adjudged a bankrupt. These admissions seem to bring the case, squarely within the language of section 67*f* and to justify the order of the District Court, affirmed by the Circuit Court of Appeals. That section reads as follows:—

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be pre-

served by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect; *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It is argued by the petitioners that section 67*f*, covers only liens the enforcement of which would result in preferences, and that, as the mere annulment of these liens would not bring any property into the estate, there can be here no preference. It is believed that, under the first head of this argument, it has been demonstrated that these creditors would be preferred over the general creditors if they were permitted to enforce their attachments, but even if this were not so, it is submitted that section 67*f* is not limited, but applies to *all* liens obtained through legal proceedings.

The following comparison of subdivisions *c* and *f* of section 67 by Brandenburg (2nd ed.) p. 667, is clear and convincing proof that no question of preference is necessarily involved in subdivision *f*.

> "While statutes should, if possible, be construed so as to give every part effect, it is sometimes impossible to harmonize them, as appears to be the case here. It is quite clear that Congress either inadvertently left subdivision *c* in the bill after adding subdivision *f*, or intended to strengthen the Act by the broader and more drastic provisions of the latter clause. Subdivision *c* provides that liens of a certain character shall be void under certain conditions, while subdivision *f* provides that all the liens embraced by subdivision *c* shall be void without reference to any conditions save the insolvency of the debtor and their being obtained within four months. Subdivision *f* is the latest ex-

pression of the legislative will and in harmony with the general purpose of the Act to avoid preferences obtained after insolvency and an express inhibition against, and a declaration of the unlawful character of, liens which subdivision *c*, if it sustains, does so by implication only. Subdivision *f*, is therefore the law governing liens obtained within four months prior to the filing of a petition in bankruptcy through legal proceedings against an insolvent debtor."

It is contended that the trustee takes only the property named in section 70*a*, and therefore has no right to liens on property which, if discharged therefrom, would pass to others; but the argument overlooks the fact that section 70*a* is engaged in enumerating in general terms what passes to the trustee by operation of law, as of the date of the adjudication, as soon as he has qualified. This is not in opposition to the provision of 67*f* for an order of the court to preserve liens for the benefit of the estate and to clothe the trustee with the right to enforce them. That is a right coming to the trustee by a special order of the court and necessarily at a time subsequent to his appointment.

Further, the suggested construction of section 67*f* is not, it is submitted, the correct construction of that section as appears clearly when it is read as an entirety. The section deals with *all* liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, and after providing that the property shall pass to the trustee discharged of the lien, says that the court may order the right under the lien to be preserved for the benefit of the estate, "and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid." The words "the same" unquestionably refer to the lien which is thus preserved, and apparently, therefore, there is drawn in this section a distinction between an annulment of liens, which permits the property af-

fected thereby to pass to the trustee, and the preservation of liens, in which case the liens themselves and the right to enforce them pass to the trustee. In this latter case it makes no difference as to what would have been the result of the annulment of the lien; the ability of the property to pass to the trustee is, therefore, not any criterion as to the right of the court to preserve the lien for the benefit of the trustee. The more natural construction would appear to be that it is in just such cases as this, where the property would not pass, that the Act contemplates a preservation of the lien for the benefit of the estate.

The ability of the property to pass to the trustee is not made (certainly not expressly made) the test whether or not section 67*f* can be applied; such passage is, in ordinary cases, the consequence and result—the sequel—of defeating the liens, yet may be prevented by special circumstances, and there is nothing in the Act to warrant the assertion that the inability of the property thus to pass to the trustee saves the liens, nor are there, it is submitted, any cases so holding.

Examination of the cases cited by the petitioners will show that they involved entirely different facts from those in the present cases. Exempt property was expressly excepted from the operation of the Act, and, therefore, cases relating to such property can have no bearing here.

Further, it is suggested, on behalf of the trustee, that whatever effect the prior unrecorded contract or the subsequently recorded deed may have had in rendering impossible the passage to the trustee of the whole property so conveyed, that property was Baird's as to these attaching creditors, at least to the extent of their attachments, and so remained, and *their rights against it* were properly transferred to the trustee for the benefit of all Baird's creditors. Though the Furnace property, by virtue of the attachments and the conveyance, was Baird's *quoad* the attachments and no further, so that, thereafter, it could only be reached through the attach-

ments, for this very reason the case called for the exercise of the power which has been so wisely used by the District Court.

It is submitted that the Virginia law has been properly applied to these cases. It can be conceded that the Registry Laws of that State are meant to protect only *lien* creditors, as is contended by the petitioners, but the language of Judge Burks, in speaking for the Virginia Supreme Court, in the case of March, Price & Company *vs.* Chambers, *et als*, 30 Grattan, 299, where the rights of judgment creditors were under discussion, shows that, as to them, an unrecorded conveyance is void, *as well as all subsequent alienations*.

Judge Burks in that case, said:—

> "The written contract and the deed from Chambers to William T. Rainey being void as to the appellants, creditors of Chambers, all the subsequent alienations are in like manner void as to these creditors. The effect of the statute is that as to the appellants, Chambers must be regarded as entitled to the Danville lot at the date of their judgment against him, in like manner and to the same extent as if he had never aliened it."

Applying the above quoted language of Judge Burks to the present cases it appears that the West End Furnace property was a part of Baird's estate, as to the petitioners, when they attached it and, thereafter, so far as they were concerned, remained a part of his estate. They cannot, therefore, under the law of Virginia as expounded by its highest court, be heard now to allege that their liens were not obtained against the property of Baird or that that property passed to Roanoke; the subsequent deed, even though recorded, could not change the character of the property, as to them, so long as the liens remain undissolved. The fact that the recorded deed deprived Baird's general creditors of all opportunity to reach the property through the process afforded by the State courts, shows with what foresight

Congress acted when it gave to the Bankruptcy Court power to preserve and control liens for the benefit of a bankrupt's estate. The lower court did not create an asset out of a debt of Baird's, as the petitioners assert, nor did it take the property of Roanoke to pay Baird's creditors; but it laid its hold upon an asset of Baird's estate in the hands of the attaching creditors and by the only method available transferred it to Baird's trustee for general distribution.

Further, it may well be questioned whether, under section 70*a*, the asset of Baird's estate which was held by the attachments of these creditors did not pass to the trustee, or at any rate the right to receive it for the benefit of the general creditors, though an order of the court assigning the rights of the attaching creditors under their liens was necessary to enable the estate of Baird completely to reduce that asset to possession. Section 70*a* of the Act provides that the trustee shall be vested by operation of law with the title of the bankrupt to all "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." The property in question was so levied upon and the only question as to this point, therefore, is what is the meaning of the words "prior to the filing of the petition?" How long prior? In these cases the levies were made some two months prior. While it is true that for most purposes the Act refers to the date of the petition, the word "prior," here used, indicates that some interval is contemplated, and in dealing with the avoidance of preferential liens or transfers, the period is extended to four months prior to the date of the petition. As the above quoted subdivision of section 70*a* refers to transfers and levies, it seems reasonable to interpret the word "prior" as meaning "within four months prior." If this construction be correct, it then appears that the trustee was, by virtue of section 70*a*, vested with an asset of Baird's estate, consisting of so much of the West End Furnace property as would be required to satisfy the attachments,

and, as section 70*a* does not point out how this asset could be made available for the benefit of Baird's estate, the trustee was compelled to ask the District Court, under the power given it by section 67*f* of the Act, to order the transfer of the rights of the attaching creditors to him.

With all the ingenuity displayed in their arguments, counsel for the attaching creditors have been quite unable to show why the explicit provision of section 67*f* of the Act should not apply in these cases.

Indeed they have been unable to show any other state of facts for which this provision was so well fitted, it being manifest that only under such circumstances as exist in the present cases, is subrogation of the trustee to the rights of attaching creditors necessary. In all other cases the property would pass to the trustee upon the dissolution of the attachments.

Counsel for the attaching creditors have, therefore, argued to the Court that the provision of the Bankrupt Act as to all attachments or other liens obtained against a *person* who is insolvent, does not mean what it says, but refers only to attachments or to liens obtained against the *property* of a person who is insolvent.

In other words, they admit that in order to succeed, they must re-write the Bankrupt Act to suit their position in these cases. As has been seen, however, their attachments *were* levied against the property of an insolvent person.

They admit that the aim of the bankrupt laws is to deal, not only with the insolvent debtor and his estate, but also with his creditors, and it is this last item in their list of purposes that is before the Court in the present cases, for the only question for argument here is the question as to whether or not, under the provisions of the Bankrupt Act, a few creditors can absorb the property of the many.

Follow the argument of the petitioners to its logical conclusion:

Suppose, in place of a number of attaching creditors, but one creditor, and no property of the bankrupt in

existence, except the property attached, which has been validly conveyed to some third person, and suppose that the claim of the attaching creditor is large enough to absorb the whole property; then suppose that in place of months having elapsed between the various acts of the parties, as in the present cases, it was a matter of days. One creditor of the bankrupt, a few days before his failure, would then, by means of an attachment, obtain full payment, while the other creditors would get nothing. And yet the petitioners argue that the construction of the Bankrupt Act by the lower courts, for the purpose of preventing such a result, is "one that does violence to all our preconceived notions of the object of a bankrupt law."

The contention of the petitioners seems to be founded upon the assumption that there being no case exactly parallel with the present cases, the decisions of the lower courts should have been in their favor. But those decisions exactly cover the ground, and it is submitted that the arguments of the attaching creditors fail to meet or overthrow them in any particular.

Judge McDowell, of the District Court, in his opinion says:—

"While the state law gives to diligent creditors who attach, a priority of payment, a preference, over those who do not attach, it is beyond dispute that the intent of the bankrupt law (except as to rights gained more than four months before the filing of the petition in bankruptcy) is just the reverse. The intent of the latter, except as aforesaid, is to prorate all available assets and to prevent any priority of payment being obtained by any creditor within the four months, whether by consent of the debtor or by the diligence of the creditor. Such being the intent of the law, it seems to me that the argument based on the supposed injustice of the act as applied to the case at bar is not of weight. Such being the intent of the law, it would be surprising if Congress had omitted to provide for the (not) uncommon state of facts which we have here. And, as above remarked, the lan-

guage of 67*f* seems entirely adapted to the case we have here as well as to other possible cases. In cases where the title to the attached property remains in the bankrupts, the liens of attaching creditors are simply annulled and the proceeds of the property are divided *pro rata* among all the creditors. In cases where the bankrupt has made a fraudulent conveyance, this deed is by proper proceedings set aside, the attachments are annulled and the proceeds of the property are prorated among all the creditors. In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the *pro rata* benefit of all the creditors."

This decision was sustained by the opinion of the Court of Appeals, which even more forcibly presses home the conclusions of the lower court.

They say:—

> "It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent, and that the court has on due notice ordered that the right under the attachments shall be preserved for the benefit of the estate and pass to and be preserved by the trustee for the benefit of the estate. There is, therefore, in the facts of this case a literal gratification of the words of this section. It is contended, however, that as the first clause of the section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of the clause of 67*f* can have reference only to liens on property, which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the more obvious meaning of the words. The wording seems clearly

to contemplate that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not if unaffected pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted, preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee.

"A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors does produce equality and prevent preferences."

In conclusion, therefore, it is submitted that these cases were properly decided by the District Court and the Circuit Court of Appeals and that their judgments should be affirmed.

H. GORDON MCCOUCH,
S. AND M. GRIFFIN,
SAMUEL W. COOPER,
JOHN DICKEY, JR.,
ARTHUR G. DICKSON,
For Respondent.

Supreme Court of the United States.

No. 213.—October Term, 1905.

First National Bank of Baltimore, Petitioner, vs. William H. Staake, Trustee. } On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 30, 1906.]

This writ of certiorari was allowed to review an order of the Circuit Court of Appeals affirming a decree of the District Court in favor of Staake, as trustee in bankruptcy of the estate of Chester R. Baird, bankrupt, subrogating him to the rights of certain creditors, and authorizing him to enforce their attachment liens with like force and effect as the attaching creditors, one of which was the First National Bank of Baltimore, might have done had not the bankruptcy proceedings intervened.

The facts of the case are substantially as follows: Chester R. Baird, doing business under the name of C. R. Baird & Co., and owning certain real estate in Virginia known as the West End Furnace Company, sold the same, December 7, 1899, to the Roanoke Furnace Company, subject to certain encumbrances, executed a contract in writing, and received from the Furnace Company the entire consideration, namely, $500,000, in the capital stock of the Furnace Company. Under this contract of sale the Furnace Company took immediate possession, but no deed to the company was made until November 5, 1900, when a deed was executed and recorded.

Meantime, however, and on October 26, 1900, nine different attachments, among them one by the petitioning bank, were sued out of the Hustings Court for the city of Roanoke, amounting to over $40,000, against Baird as a non-resident, and were levied upon the furnace property. Under the provisions of the law of Virginia the attachments, having been levied before the deed of the furnace property had been executed and recorded, the attaching creditors acquired, as against Baird and the Furnace Company, a lien on the properties attached.

Within four months after the levy of the attachments, namely, December 24, 1900, Baird was adjudicated a bankrupt in the District Court for the Eastern District of Pennsylvania, and on January 2, 1901, the District Court for the Western District of Virginia assumed ancillary jurisdiction of such property as was located in Virginia. On December 29, 1900, the Roanoke Furnace Company was also adjudicated a bankrupt. On

March 26, 1901, Staake was appointed trustee of Baird's estate, and on June 29, 1901, John M. N. Shimer was appointed trustee of the Roanoke Furnace Company.

It was further agreed that the deed of November 5, 1900, from Baird to the Roanoke Furnace Company was a valid conveyance to a purchaser in good faith for a then fair consideration, and was not affected by the bankruptcy proceedings.

The proceedings in question here were instituted by a petition filed by Staake, entitled both in the cases of Chester R. Baird and the Roanoke Furnace Company, averring that under the laws of Virginia the rights of the attaching creditors were superior to those of the Furnace Company, and that as to them the property attached was the property of Baird; but that, by reason of his insolvency and of the fact that these attachments had been levied within four months preceding the filing of the petition in bankruptcy, such attachments were null and void, unless the Court should order them preserved for the benefit of the estate. He therefore prayed that they be decreed null and void as regards plaintiffs, but that they be preserved for the benefit of petitioner.

The bank demurred to this petition, and also answered denying that its attachment was null and void, and also denying the right of the Court to enter an order preserving the attachment for the benefit of the petitioner; and alleging that respondent is entitled to the benefit of the attachment, said property when sold by an interlocutory order having realized enough to pay said attachment, as well as all prior liens.

Shimer, trustee for the Roanoke Furnace Company, also answered, praying that, if the attachment be continued for the trustee of Baird, the petitioner should be required to abate a large claim which he filed against the estate of the Roanoke Company, by the amount of said attachments.

Upon a hearing before the District Court that Court overruled the demurrer to Staake's petition, and authorized him to enforce the attachment liens for the benefit of the estate. (126 Fed. Rep. 845.) The Court of Appeals affirmed this action, (133 Fed. Rep. 717,) and the bank petitioned this Court for a writ of certiorari, which was granted.

Mr. Justice Brown delivered the opinion of the Court.

At the time these attachments were levied, the title to the property in question stood in the name of Baird, and the attaching creditors by their levies secured a preferential lien upon the property, not only as against Baird, but also as against the Furnace Company, which received a deed to the property November 5, 1900, after the attachments had been levied. These attachments, however, were annulled by the filing of a petition in bankruptcy against Baird within four months after the attachments were

levied, and if the case stood upon this fact alone there could be no doubt that the property would pass to the trustee of the Furnace Company, discharged of the lien of the attachments. We are not concerned here with any conflicting rights of the two trustees, Staake and Shiner, since they were both appointed receivers of the Roanoke Furnace Company, and the only claim made by Shiner now is that, if the attachments be continued, the petitioner Staake be required to abate his claim against the estate of the Furnace Company by the amount of these attachments. It is therefore unnecessary to consider whether, if the attachments were annulled, the property would pass unencumbered to the trustee of the Furnace Company, since, as stated by the District Judge, the demurrer to the petition is intended merely to raise the question whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

This depends upon the peculiar terms of section 67 of the Bankrupt Act, which provides as follows:

"SEC. 67*f*. That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, *unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate;* and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Section 67*e*, which also treats of liens created by attachments on mesne process and provides for their dissolution, in the last clause declares that—

"if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

This section (67*f*) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the Court may order that the right acquired by the attachment shall be pre-

served for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is, "for the benefit of the estate"—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors.

The first provision contemplates the attachment of property to which the bankrupt has the complete, legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy.

In the present case Baird had contracted to convey the property to the Roanoke Furnace Company, possession had been taken and the consideration paid, but the deed was not actually executed and recorded until after the attachment had been levied. Hence, under the Virginia statute, the validity of which is not questioned, the lien of the attachment took precedence of the deed, and would have remained a prior lien, had it not been for the institution of the bankruptcy proceedings within four months. This dissolved the attachment, and had the case rested here the property would have apparently passed to the Furnace Company, or to its trustee in bankruptcy, Shimer; but at this point the Court, under the second proviso of 67 *f*, interposed and recognized the lien of the attachment, not, however, solely for the benefit of the attaching creditors, but for the benefit of Baird's estate. Shimer made no objection, and the Court declined to express an opinion as to his rights.

This is one of the very contingencies provided for by the second clause of the section, which apparently vests in the Court a certain discretion with regard to the preservation of the right acquired under the attachment or other lien. In this case the Court recognized the validity of the lien, the trustee of the Furnace Company making no objection to this; but the attaching creditors insist that, as the lien was acquired for their

own benefit, they should not be required to share with the general creditors of Baird's estate.

Their argument is based upon the theory that the second clause was not intended to apply to liens acquired upon the estate of third parties, but to property which would have passed to Baird's trustee had the attachment not been levied. In other words, that the Bankruptcy Court has nothing to do with the property, since it really did not belong to the bankrupt, and would have passed to his vendee if the attachments had not been levied upon it. Indeed the opinion especially finds that "had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company."

To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition, but at the same time preserved to the general body of creditors, as against third parties, (such as purchasers under an unrecorded deed,) such liens as attaching creditors had secured upon property which would have passed to the subsequent purchaser in case the attachment had not been levied. It is true that the attaching creditors are thereby deprived of the fruits of their diligence, but the same thing would have happened had the attachment been levied upon property to which the bankrupt had the whole and undisputed title, or of which he had made a fraudulent conveyance. As remarked by the District Judge, "In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the *pro rata* benefit of all the creditors."

Section 67 *f* is merely carrying out the general purposes of the act, of securing to the creditors the entire property of the bankrupt, reckoning as part of such property liens obtained by attaching creditors against real estate which had been transferred to another, though no deed had been actually executed and recorded.

The argument that section 67 *f* in question here refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, we think is unsound, since that contingency is amply provided for by the prior clause of the section annulling all such liens, and providing that property affected thereby shall pass to the trustee as a part of the estate. Under the argument of the attaching creditors in this case, the subsequent clause would be entirely unnecessary. This clause evidently contemplates that attaching creditors may acquire liens upon

property which would not pass to the bankrupt, if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken doubtless this property would have been sold for the benefit of the attaching creditors.

The general rule relied upon by the bank in this case, that the words "property of the bankrupt" mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title, is perhaps justified by our decision in *Hewitt* v. *Berlin Machine Works*, (194 U. S. 296.) But the extent to which the bankruptcy court shall recognize the rights obtained by creditors upon property attached as the property of the bankrupt, though in fact such property had been conveyed by an unrecorded contract, is a matter solely within the discretion of Congress. The liens acquired in this case were liens upon property, which as to attaching creditors was the property of the bankrupt, and Congress may lawfully insist that it shall be reckoned as a part of his estate, and pass to the trustee. As remarked by the Court of Appeals: "The rule that the trustee take the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which although valid as to the bankrupt, are invalid as to creditors."

If the interest of Baird in this property were sold solely for the benefit of the attaching creditors, it would obviously result in a preference to those creditors over the general creditors of his estate, and in fraud of the bankruptcy act, which is designed to secure equality among all creditors.

The judgment of the Court of Appeals is

Affirmed.

No. 214.

Henry K. McHarg, Receiver, et al., Petitioners, *vs.* William H. Staake, Trustee. } On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

PER CURIAM: As the facts in this case are practically the same as those set forth in the preceding and the legal principles are identical, this is also

Affirmed.

Mr. Justice HARLAN, Mr. Justice WHITE, and Mr. Justice PECKHAM dissented in both cases.